SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 129

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF LOUISE P. V. WHITCOMB, DECEASED, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES OF ATTORNEYS.

ALFRED SUTRO, Esq., F. T. SMITH, Esq., V. K. BUTLER, Esq., ROBERT LITTLETON, Esq., For Taxpayer.

JOHN D. FOLEY, Esq., For Commissioner.

DOCKET ENTRIES.

1926

May 19—Petition received and filed.
" 21—Copy of petition served on solicitor.
" 21—Notification of receipt mailed taxpayer.
July 16—Answer filed by solicitor.
Aug. 25—Copy of answer served on taxpayer, general calendar.

1928

June 30—Hearing date set 10-23-28.
Oct. 17—Motion to transfer to reserve cal. filed by taxpayer. See 16117. Granted 10-18-28.

1929

Mar. 11—Hearing set 4-18-29.
Apr. 5—Motion to place on reserve cal. filed by G. C. See 16121. 4-8-29 granted.
" 8—Motion to place on reserve cal. filed by taxpayer. No action necessary.
Nov. 19—Hearing set Jan. 24, 1930.
" 26—Motion to place on cir. cal. for hearing in San Francisco, Cal., filed by taxpayer. See 16117.
" 29—Motion granted.

1930

Mar. 11—Hearing set May 19, 1930, San Francisco, Cal.

Apr. 19—Motion to consolidate with dkts. 16117 to 16122, 27940 to 27944 and 46510 to 46513 and to amend petition, amendment tendered, filed by taxpayer. 4-19-30 granted.

" 24—Copy of amended petition served on G. C.

May 19—Hearing had before Mr. Marquette. Submitted. Motion to consolidate for hearing and decision with dkts. 46510-11-12-27940-41-42-43-44-16117-18-19-20-21-22. Amended answer to be filed by respondent. (Dictated into record) briefs due Sept. 1, 1930.

Aug. 16—Stipulation for extension to 10-1-30 to file briefs filed. 8-22-30 granted.

" 19—Transcript of hearing of May 19, 1930 filed.

Sept. 25—Motion for extension to Oct. 15, 1930 to file brief filed by taxpayer. 9-29-30 granted. See 16117.

" 29—Brief filed by G. C.

Oct. 8—Motion for extension to Nov. 1, 1930 to file brief filed by taxpayer. 10-9-30 granted.

" 31—Request for findings of fact and brief filed by taxpayer. [1]*

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1931

Feb. 11—Findings of fact and opinion rendered, John J. Marquette, Div. 1. Judgment will be entered under rule 50.

May 20—Notice of settlement filed by G. C.

" 25—Hearing set June 24, 1931, on settlement.

June 13—Consent to settlement filed by taxpayer.

" 25—Decision entered, John J. Marquette, Div. 1.

Dec. 22—Petition for review to U. S. Cir. Ct. of Ap. (9) with assignments of error filed by G. C.

" 22—Proof of service filed.

1932

Feb. 10—Motion for extension to Apr. 20, 1932 for preparation of evidence and delivery of record filed by G. C.

" 12—Order enlarging time to April 20, 1932, for preparation of evidence and delivery of record entered.

Mar. 17—Statement of evidence lodged.

" 19—Notice of lodgment of statement and of hearing Mar. 30, 1932, filed.

" 30—Hearing had before Miss Matthews on approval of statement of evidence. Motion of petitioner to continue granted to April 13, 1932.

" 30—Order of continuance to April 13, 1932 for hearing on approval of statement of evidence entered.

Apr. 12—Statement of evidence approved and ordered filed.

" 14—Praecipe with proof of service thereon filed.

" 18—Order entered extending time for transmission of record to May 20, 1932. [2]

United States Board of Tax Appeals.

Docket No. 16,120

ESTATE OF LOUISE P. V. WHITCOMB,
Deceased,

By

JOHN FREULER, Administrator,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:PA:1-60D-GWF-105) dated March 23, 1926, and as the basis of his proceeding alleges as follows:

1. Louise P. V. Whitcomb was, up to her death in 1921, a non-resident alien individual. John Freuler, Administrator of the decedent's Estate, is an individual residing in San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 23, 1926.

3. The taxes in controversy are income taxes for the calendar year 1921 and for the amount of $723.60. [3]

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

The Commissioner in determining the taxable income of the decedent, up to the date of her death in 1921, added to her distributive share of the net income of the trust estate of A. C. Whitcomb, a portion of the depreciation and losses sustained by and allowable to the said Estate in determining its net income for the taxable year 1921.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A fiduciary return on Form 1041 was filed for the trust estate of A. C. Whitcomb for 1921 by the Trustee. In computing the net income of the said Estate and the distributive income of each beneficiary thereof, there were claimed as deductions $43,003.16 as depreciation on the physical assets of the Estate used in producing the income thereof, and $3,587.50 as losses sustained on the sale of Liberty Bonds, a total deduction of $46,590.66. In computing the distributive share of net income of each of the beneficiaries of the said Estate, including the petitioner, the Commissioner has added back to

such distributive share a proportionate part of the depreciation [4] and losses sustained by the Estate, the total depreciation and losses so added back being $46,590.66, of which $7,765.08 was added back to the distributive share of net income of the petitioner.

6. The propositions of law involved are these: The income to be included in the individual return of the petitioner as income from the trust estate created by A. C. Whitcomb is limited to the petitioner's distributive share of the correctly computed net income of the Estate.

WHEREFORE, the petitioner prays that it be held by the Board that the error above mentioned was made by respondent and that no liability rests upon the petitioner to pay the taxes asserted in the notice of deficiency, and for such other relief as may appear equitable and proper as this cause progresses.

W. W. SPALDING,
Counsel for Petitioner,
Woodward Building,
Washington, D. C. [5]

State of California,
County of San Francisco.—ss.

John Freuler, being duly sworn, says that he is the duly appointed Administrator of the Estate of Louise P. V. Whitcomb, and as such is duly authorized to verify the foregoing petition; that he has read the said petition and is familiar with the

statements therein contained; and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

JOHN FREULER.

Subscribed and sworn to before me this 11th day of May, 1926.

[Seal] MINNIE V. COLLINS,
Notary Public. [6]

EXHIBIT "A"

Form NP-2

Treasury Department
Washington

IT:PA:1-60D Mar 23, 1926.
GWF-105

Louise P. V. Whitcomb,
c/o James Otis,
201 Sansome St.,
San Francisco, Calif.

Madam:

The determination of your income tax liability for the year 1921, as set forth in office letter dated February 8, 1926, disclosed a deficiency in tax amounting to $723.60.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be

mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assesment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:1, GWF-105-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. Blair,

Commissioner.

Enclosures:
Statement
Waiver - Form A
Form 882.

By /s/ C. R. Nash

Assistant to the Commissioner. [7]

IT:PA:1-60D
GWF-105

Statement

In re: Louise P. V. Whitcomb,
c/o James Otis,
201 Sansome St.,
San Francisco, Calif.

1921

Deficiency in Tax—$723.60

An audit in connection with the fiduciary return of income, Form 1041, filed for the Estate of A. C. Whitcomb, discloses your distributive share of the net income of the estate as corrected to be $10,019.97 instead of $2,254.89 as reported in your return. This amount has been reduced by $273.30, representing non-taxable Liberty Bond interest reported from the estate, leaving taxable distributive income of $9,746.67. The change is due to certain adjustments made in the fiduciary return, which are fully explained in a letter of this date addressed to Mr. James Otis, Trustee under the Will of A. C. Whitcomb, deceased.

Your taxable net income as corrected is $9,746.67 upon which the correct tax liability is $797.97. Since the records disclose a previous assessment of $74.37, there is a deficiency of $723.60.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[Endorsed]: Filed May 19, 1926. [8]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1 of the petition.

(2) Admits the allegations contained in paragraph 2 of the petition.

(3) Admits the allegations contained in paragraph 3 of the petition.

(4) Denies that he committed the error alleged in paragraph 4 of the petition.

(5) Admits that a fiduciary return was filed for the trust estate of A. C. Whitcomb, for the year 1921 by the trustee, that deductions on account of depreciation and losses on the sale of Liberty Bonds was claimed on such return in the amounts alleged in paragraph 5 of the petition, and that the Commissioner restored such deductions to income and thereby proportionately increased the distributive shares reported for the beneficiaries. Denies, however, that any loss was sustained on the sale of Liberty Bonds, or that if a loss was sustained, the amount thereof was $3,587.50, and further denies any depreciation was sustained or that if depreciation was sustained, the amount thereof was $43,003.16. Denies that the trustee was empowered or

required by the trust instruments to deduct depreciation for losses on the sale of capital assets in determining the distributive shares of the beneficiaries. [9]

(6) Denies generally and specifically each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
M. N. FISHER,
Special Attorney.

[Endorsed]: Filed July 16, 1926. [10]

United States Board of Tax Appeal.

	Docket
MARGUERITE T. WHITCOMB,	No. 16117
LOUIS A. WHITCOMB,	No. 16118
ESTATE OF LOUISE P. V. WHITCOMB,	No. 16119
ESTATE OF LOUISE P. V. WHITCOMB,	No. 16120
LYDIA L. WHITCOMB,	No. 16121
CHARLOTTE A. W. LEPIC,	No. 16122
LOUISE A. F. E. WHITCOMB,	No. 27940
MARIE M. E. G. T. WHITCOMB,	No. 27941
ESTATE OF LOUISE P. V. WHITCOMB,	No. 27942
LYDIA L. I. WHITCOMB,	No. 27943
CHARLOTTE ANDREE WHITCOMB LEPIC,	No. 27944
LOUISE A. F. E. WHITCOMB,	No. 46513
LYDIA LOUISE IDA WHITCOMB,	No. 46511
MARIE M. E. G. WHITCOMB,	No. 46512
CHARLOTTE ANDREE WHITCOMB LEPIC,	No. 46510
Petitioners,	
vs.	
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	

CONSOLIDATED, AMENDED AND SUPPLEMENTAL PETITION.

The above named petitioners hereby petition for a redetermination of the respective deficiencies set forth by the Commissioner of Internal Revenue in his notices of deficiency designated and dated as follows, to-wit:

(a) IT:PA:1-60D-GWF-105-March 23, 1926 (except the notice of $178.52 deficiency of Freuler, Administrator, which was dated March 24, 1926);

(b) IT:PA:1-60D-LVH-March 8, 1927;

(c) IT:AR:B-2:OVN-60D-November 4, 1929;

and as a basis of their respective proceedings allege as [11] follows:

1. The respective petitioners are as follows:

(a) The petitioner, Louise Adolphine France Emmanuelle Whitcomb, also known as Louis A. Whitcomb (by error referred to in the male gender in the original petition filed in Docket No. 16,118) and also known as Louise A. F. E. Whitcomb, is a non-resident alien individual residing in France and is also a minor. John Freuler, an individual residing in the City of San Francisco, State of California and having his business address at 485 California Street in said City and State, is the duly qualified and acting guardian of the estate of the said petitioner.

(b) The petitioner, Lydia Louise Ida Whitcomb, also known as Lydia L. Whitcomb, and also known as Lydia L. I. Whitcomb, is a non-resident alien individual residing in France, and is also a minor. Said John Freuler is the duly qualified and acting guardian of the estate of said petitioner.

(c) The petitioner, Marguerite Marie Elizabeth Gabrielle Thuret Whitcomb, also known as Marguerite T. Whitcomb, also known as Marie M. E. G. T. Whitcomb, and also known as Marie M. E. G. Whitcomb, is a non-resident alien individual residing in France. Said John Freuler is her agent and she has duly authorized him by written Power-

of-Attorney to represent her in all matters pertaining to her federal income tax liability.

(d) The petitioner, Countess Charlotte Andrée Whitcomb Lepic, also known as Charlotte A. W. Lepic, is a non-resident alien individual residing in France. Said John Freuler is her agent and she has duly authorized him by written Power-of-Attorney to [12] represent her in all matters pertaining to her federal income tax liability.

(e) The petitioner, John Freuler, Administrator of the Estate of Louise Palmyre Vion Whitcomb, deceased, is the duly qualified and acting administrator of the estate of said decedent. Said decedent was, up to her death in 1921, a non-resident alien individual residing in France. Said John Freuler is an individual residing in San Francisco, California, as aforesaid.

(f) James Otis, is an individual residing in San Francisco, California, having his business address at 310 California Street in said City and State. Said James Otis is the sole duly qualified and acting trustee under the will of A. C. Whitcomb, deceased, from which all the income derived from sources within the United States by the respective petitioners has been and is now received.

2. The respective notices of deficiency are as follows:

(a) Six notices of deficiency of income tax for the calendar year 1921, each designated by the

symbols IT:PA:1-60D-GWF-105 and each dated March 23, 1926, (except the notice of $178.52 deficiency of Freuler, Administrator, which was dated March 24, 1926). Said respective notices of deficiency were mailed on or about said date to the respective petitioners, Louise A. F. E. Whitcomb, Lydia L. I. Whitcomb, Marguerite Marie E. G. T. Whitcomb, Charlotte A. W. Lepic, Louise P. V. Whitcomb (petitioner Freuler's decedent) [13] and John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased. Copies of said notices are attached hereto, made a part hereof, and marked Exhibit "A," Exhibit "B," Exhibit "C," Exhibit "D," Exhibit "E" and Exhibit "F" respectively.

(b) Five notices of deficiency of income tax for the calendar years 1922 to 1925 inclusive each designated by the symbols IT:PA:1-60D-LVH, and each dated March 8, 1927. Said respective notices of deficiency were mailed on said date to the respective petitioners Louise A. F. E. Whitcomb, Lydia L. I. Whitcomb, Marguerite Marie E. G. T. Whitcomb, Charlotte A. W. Lepic and John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased. Copies of said notices are attached hereto, made a part hereof, and marked Exhibit "G," Exhibit "H," Exhibit "I," Exhibit "J" and Exhibit "K" respectively.

(c) Four notices of deficiency of income tax for the calendar year 1926, each designated by the

symbols IT:AR:B-2:OVN-60D, and each dated November 4, 1929. Said respective notices of deficiency were mailed on said date to the respective petitioners, Louise A. F. E. Whitcomb, Lydia L. I. Whitcomb, Marguerite Marie E. G. T. Whitcomb and Charlotte A. W. Lepic. Copies of said notices are attached here- [14] to, made a part hereof, and marked Exhibit "L," Exhibit "M," Exhibit "N" and Exhibit "O" respectively.

3. The taxes in controversy are income taxes of the respective petitioners for the respective taxable years and in the respective amounts as follows:

Each of the following taxpayers, namely,

(a) Louise A. F. E. Whitcomb,

(b) Lydia L. J. Whitcomb, and

(c) Marguerite Marie E. G. T. Whitcomb,

has the following amounts of taxes in controversy:

Proposed Deficiencies.

Year	Amount
1921	$487.58
1922	505.57
1923	401.95
1924	373.43
1925	303.83
1926	494.25
Total	$2,566.61

[15]

(d) Charlotte A. W. Lepic has the following amounts in controversy:

Proposed Deficiencies.

Year	Amount
1921	$ 2,300.44
1922	2,753.14
1923	2,399.50
1924	2,757.60
1925	2,006.36
1926	3,278.99
Total	$15,496.03

(e) John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased, has the following amounts in controversy:

Proposed Deficiencies.

Year	Amount
1921 (prior to the death of petitioner's decedent)	$ 675.77
1921 (subsequent to death of petitioner's decedent)	162.58
1922	364.19
1923	281.92
1924	262.57
1925	251.27
Total	$1,998.30

The determination of tax set forth in each of said notices of deficiency is based upon the following errors: [16]

(a) Respondent erred in adding back to the net distributive income of each of the respective petitioners for the respective taxable years herein involved a portion of the depreciation sustained during said respective years by the trust estate created by the will of A. C. Whitcomb, deceased, which bore the same proportion to the total amount of depreciation so sustained that the income to which such petitioner was entitled under said trust bore to the total amount of distributive income therefrom.

Said total depreciation of said trust estate erroneously included by the respondent as aforesaid, as a part of the taxable net income of the petitioners is as follows:

Year	1921	1922	1923
Depreciation	$43,003.16	$39,408.00	$39,408.00

Year	1924	1925	1926
Depreciation	$39,258.00	$39,108.00	$55,833.00

Said amounts so added back to the net income of the respective petitioners are, by years, as follows: [17]

Year	1921	1922	1923
L. A. F. E. Whitcomb	$5,574.48	$5,638.22	$5,838.22
L. L. I. Whitcomb	5,574.48	5,838.22	5,838.21
M.M.E.G. Whitcomb	5,574.49	5,838.22	5,838.21
C. A. W. Lepic	16,723.45	17,514.67	17,514.68
Estate of L. P. V. Whitcomb	(7,167.19 (2,389.07	4,378.67	4,378.68
Total depreciation	$43,003.16	$39,408.00	$39,408.00

Year	1924	1925	1926
L. A. F. E. Whitcomb	$5,816.00	$5,793.77	$9,305.50
L. L. I. Whitcomb	5,816.00	5,793.78	9,305.50
M. M. E. G. Whitcomb	5,816.00	5,793.78	9,305.50
C. A. W. Lepic	17,447.99	17,381.35	27,916.50
Estate of L. P. V. Whitcomb	4,362.01	4,345.33	
Total depreciation	$39,258.00	$39,108.01	$55,833.00

5. The facts upon which the respective petitioners rely as the basis of their respective proceedings are as follows:

(a) Petitioners, and each of them, are the life beneficiaries of the estate of A. C. Whitcomb, deceased.

A. C. Whitcomb died in the year 1899, or thereabouts, leaving a last will and testament, copy of which is attached hereto and marked Exhibit "P."

The last will and testament of A. C. Whitcomb, deceased, [18] was duly proved and probated in the Superior Court of the State of California, in and for the City and County of San Francisco.

The Executors named in the will of A. C. Whitcomb were Jerome Lincoln and Adolphus Darwin Tuttle, who were directed to carry out the provisions of said will and administer the Estate of A. C. Whitcomb as therein provided.

The income from the trust estate was paid in equal shares to Louise P. V. Whitcomb, Adolph Whitcomb and Charlotte A. W. Lepic until the death of Adolph Whitcomb, which occurred September 5, 1914. Thereafter and until the death of said Louise P. V. Whitcomb on June 14, 1921, the one-third share of the said Adolph Whitcomb in the income was paid in three equal parts to his widow, Marguerite Marie E. G. T. Whitcomb, and his two children, Lydia L. I. Whitcomb and Louise A. F. E. Whitcomb, petitioners herein; the remaining two-thirds of the income from the trust estate was paid in equal shares to Louise P. V. Whitcomb and Charlotte A. W. Lepic. From June 14, 1921, until on or about August 28, 1925, four-ninths of the total net income of said trust [19] estate was paid to said widow and said two children of Adolph Whitcomb, petitioners herein, an additional four-ninths thereof to Charlotte A. W. Lepic, petitioner herein, and the remaining one-ninth thereof to John Freuler, Administrator of the Estate of Louise P.

V. Whitcomb, deceased, petitioner herein. At all times herein mentioned since August 28, 1925, one-half of the income has been paid to said widow and two children of Adolph Whitcomb, petitioners herein, and the remaining one-half thereof to Charlotte A. W. Lepic, petitioner herein. Upon the death of Charlotte A. W. Lepic said trust will terminate and the remainder interests in the assets of said trust estate will vest in possession and enjoyment.

(b) The original Trustee of said Estate, provided for under Seventh Paragraph of the will of A. C. Whitcomb, was Jerome Lincoln, who had power to appoint his successors in trust. On or about the 3rd day of September, 1891, said Jerome Lincoln, acting under said power of appointment, by an instrument in writing, duly executed, given, and made, appointed Winfield S. Jones, Jerome B. Lincoln and James Otis to be his successors under said trust. [20]

On or about the 23rd day of February, 1896, the said Jerome Lincoln died, and said Winfield S. Jones, Jerome B. Lincoln and James Otis became Trustees of said trust. Thereafter the said Winfield S. Jones and Jerome B. Lincoln died, and James Otis became the sole surviving Trustee of said trust. At all times since the year 1905 said James Otis has been and now is the sole Trustee of said trust.

(c) On or about the 11th day of April, 1890, by decree of final distribution in the matter of

the Estate of said A. C. Whitcomb, deceased, the Superior Court of the City and County of San Francisco, State of California, duly ordered and decreed that certain property be distributed in trust. An itemized list of said property so distributed is attached hereto, made a part hereof and marked Exhibit "Q."

Said property consisted almost entirely of assets of a character nondepreciable by wear, tear and exhaustion. On or about February 23, 1906, James Otis, as trustee of said trust estate, owned and held promissory notes, mortgages, bonds, corporate stocks and savings deposits in the aggregate value of $3,082,907.42 together with the lots mentioned in Exhibit "Q" and other unimproved lots valued at approximately $19,000.00. During the years 1906 to 1924 inclusive said trustee purchased and constructed hotels, buildings, improvements and hotel furniture and fixtures at a total cost of over $2,000,000.00, thus changing a large part of the corpus [21] of said trust estate from property and assets of a nondepreciable character by wear, tear and exhaustion to property of a highly depreciable character by wear, tear and exhaustion. On November 12, 1928, James Otis, as said trustee, held only one unimproved lot, only $113,915.00 in bonds and stocks and only $66,000 in promissory notes.

(d) During the years 1921 to 1926, inclusive, depreciation was sustained and allowed as a deduc-

tion to said Trust Estate, by the Bureau of Internal Revenue, in the following amounts:

1921	$43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00

Prior to the time that the Trustee of said Trust Estate converted the assets thereof from non-depreciable to depreciable property, it was the practice to distribute to the life beneficiaries thereof the entire net income therefrom. After said conversion, the surviving Trustee, James Otis, continued, on the advice of his attorney, to distribute the net income of said Estate to the life beneficiaries thereof without settling up a reserve to take care of depreciation sustained on depreciable assets. [22]

(e) On or about the 5th day of September, 1928, the trustee of said estate filed in the Superior Court of the State of California, in and for the City and County of San Francisco, having jurisdiction of said estate, a petition for the settlement of his account of his trusteeship for the period from February 23, 1903 to February 23, 1918. On the hearing of said petition, Napoleon Charles Louis Lepic and Charlotte de Rochechouart, both of whom are remaindermen and not life-beneficiaries, objected to the approval of said account and protested

against the said practice of said trustee in making distributions to the life beneficiaries of said estate without setting aside a reserve for said depreciation and for certain losses. On or about the 19th day of September, 1928, the said Superior Court allowed said objections in part and ordered that said trustee withhold annually, as a reserve for depreciation of the assets of said estate, such an amount as might be reasonable and proper and ordered that the respective petitioners repay to the said trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections, as the respective amount which should have been retained by said trustee as a reserve for depreciation for each of said years. A copy of said order is attached hereto, made a part hereof and marked Exhibit "R."

By said order the respective petitioners were legally [23] bound to repay to said trustee their respective distributive shares of the following respective amounts on account of depreciation sustained by the trust assets during the respective taxable years herein involved:

Year	1921	1922	1923
Amount	$43,003.16	$39,408.00	$39,408.00
Year	1924	1925	1926
Amount	$39,258.00	$39,108.00	$55,833.00

(f) Thereafter the respective petitioners repaid to said estate the total respective proportionate

amounts required of them with respect to the depreciation for the years 1913 to 1927, both inclusive, in the total amount of $622,434.11.

The respective amounts which each of the petitioners paid back to said estate on account of said depreciation for the taxable years herein involved are the respective proportional amounts of the depreciation of the assets of said trust estate erroneously added back by respondent, as aforesaid, to each of the petitioners' taxable net income for the taxable years herein involved. Since the petitioners received and were paid said amounts illegally under mistake of law and fact, and have returned the same to said trust estate, and were never legally entitled to receive any part thereof, and are not now [24] in receipt of the same or any part thereof, said amounts do not constitute taxable income of the respective petitioners. Respondent has refused and declined to compute the tax liability of petitioners in accordance with the aforesaid facts, which materially affect the determination of income derived from the trust estate; but has erroneously and wrongfully held that his former determination in reference to the tax liability should be adhered to and affirmed.

WHEREFORE, petitioners, and each of them, pray that this Board may hear their consolidated proceedings and that it be held by this Board that the errors above mentioned were made by respond-

ent and for such other relief as may appear equitable and proper as the cause progresses.

FELIX T. SMITH,
Counsel for Petitioners,
Standard Oil Bldg., San Francisco, Cal.

ROBERT A. LITTLETON,
Counsel for the Petitioners,
Tower Building, Washington, D. C.

LOUISE ADOLPHINE FRANCE EMMANUELLE WHITCOMB,
By JOHN FREULER,
Guardian of the Estate of Louise Adolphine France Emmanuelle Whitcomb, a non-resident minor. [25]

LYDIA LOUISE IDA WHITCOMB,
By JOHN FREULER,
Guardian of the Estate of Lydia Louise Ida Whitcomb, a non-resident minor.

MARGUERITE MARIE ELIZABETH GABRIELLE THURET WHITCOMB,
By JOHN FREULER,
Attorney in Fact.

CHARLOTTE ANDREE WHITCOMB LEPIC,
By JOHN FREULER,
Attorney in Fact.

JOHN FREULER,
Administrator of the will of Louise Palmyre Vion Whitcomb, deceased.

JAMES OTIS,
Trustee under the will of A. C. Whitcomb, deceased. [26]

State of California,
City and County of San Francisco.—ss.

John Freuler, being duly sworn, deposes and says: That he is the duly qualified and acting guardian of the Estate of Louise Adolphine France Emmanuelle Whitcomb, a non-resident minor and one of the above named petitioners; that he is the duly qualified and acting guardian of the Estate of Lydia Louise Ida Whitcomb, a non-resident minor and one of the above named petitioners; that he is the attorney in fact of Marguerite Marie Elisabeth Gabrielle Thuret Whitcomb, one of the above named petitioners, and is duly authorized by her, by her written power of attorney, to act for her in all matters pertaining to her federal income tax liability; that he is the attorney in fact of Charlotte Andree Whitcomb Lepic, one of the above named petitioners, and is duly authorized by her by written power of attorney to act for her in all matters pertaining to her federal income tax liability; that he is the duly qualified and acting Administrator of the Estate of Louise Palmyre Vion Whitcomb, deceased, one of the above named petitioners; that that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JOHN FREULER.

Subscribed and sworn to before me this 10th day of April, 1930.

[Seal] FRANK G. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [27]

State of California,
City and County of San Francisco.—ss.

James Otis, being duly sworn, says that he is the Trustee of the Estate of A. C. Whitcomb and as such is duly authorized to verify the foregoing petition; that he has read the said petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JAMES OTIS.

Subscribed and sworn to before me this 10th day of April, 1930.

(Notarial Seal) FRANK G. OWEN,
Notary Public, in and for the City and County of San Francisco, State of California.

For deficiency letter, see original petition filed in this issue.

For Exhibits "P," "Q," and "R," see statement of evidence;

Appendix No. 1, Exhibit "A," Appendix No. 1, portion of Exhibit "B," "Real Property," and Appendix No. 7, respectively.

[Endorsed]: Filed April 19, 1930. [28]

[Title of Court and Cause.]

ANSWER TO CONSOLIDATED, AMENDED AND SUPPLEMENTAL PETITION.

Now comes the Commissioner of Internal Revenue, respondent herein, by C. M. Charest, General Counsel, Bureau of Internal Revenue, his attorney, and for answer to the consolidated, amended and supplemental petition heretofore filed admits and denies as follows:

1 (a), (b), (c), (d), (e) and (f). Admits the allegations of paragraphs 1 (a), (b), (c), (d), (e) and (f).

2 (a), (b) and (c). Admits the allegations of paragraphs 2 (a), (b) and (c).

3 (a), (b), (c), (d) and (e). Admits the allegations of paragraphs 3 (a), (b), (c), (d) and (e.)

Denies that he has committed error in his determination of the deficiencies herein involved. [29]

5 (a). Admits the allegations of paragraph 5(a).

5 (b). Admits the allegations of paragraph 5 (b).

5 (c). Answering the allegations of paragraph 5 (c) he admits that on or about April 11, 1890, by decree of final distribution in the matter of the Estate of A. C. Whitcomb, deceased, the Superior Court of the City and County of San Francisco, State of California, duly ordered and decreed that certain property be distributed in trust. Admits that an itemized list of said property so distibuted is attached to the petition as Exhibit Q. Admits

that on or about February 23, 1906, James Otis, as trustee of said trust estate, owned and held promissory notes, mortgages, bonds, corporate stocks and savings deposits in the aggregate value of $3,082,-907.42 together with the lots mentioned in Exhibit Q and other unimproved lots valued at approximately $19,000.00. Admits that during the years 1906 to 1924, inclusive, said trustee purchased and constructed hotels, buildings, improvements and hotel furniture and fixtures at a total cost of over $2,000,000.00. Denies the remaining allegations of paragraph 5 (c).

5 (d). Answering the allegations of paragraph 5 (d) he admits that during the years 1921 to 1926, inclusive, depreciation was sustained and allowed as a deduction to said trust estate by the Bureau of Internal Revenue in the following amounts:

1921	$43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00

Admits that in determining the amount of income of the trust which was distributable, the trustee did not take into account depreciation sustained [30] by the property of the trust estate. Denies the remaining allegations of paragraph 5 (d).

5 (e). Answering the allegations of paragraph 5 (e) he admits that on or about the 5th day of

September, 1928, the trustee of said estate filed in the Superior Court of the State of California, in and for the City and County of San Francisco, having jurisdiction of said estate, a petition for the settlement of his account of his trusteeship for the period from February 23, 1903 to February 23, 1928. Admits that on the hearing of said petition, Napoleon Charles Louis Lepic and Charlotte de Rochechouart, both of whom are remaindermen and not life-beneficiaries, objected to the approval of said account. Denies the remaining allegations of paragraph 5 (e).

5 (f). Denies the allegations of paragraph 5 (f).

Denies generally and specifically each and every allegation of said consolidated, amended and supplemental petition not hereinbefore expressly admitted, qualified or denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
By J. D. F.
Of Counsel.
JOHN D. FOLEY,
Special Attorney, Bureau of Internal Revenue.

Filed at Hearing May 19, 1930. [31]

A true copy: Teste B. D. Gamble, Clerk U. S. Board of Tax Appeals.

22 B. T. A. .....

United States Board of Tax Appeals.

MARGUERITE T. WHITCOMB, (MARIE M. E. G. and MARIE M. E. G. T. WHITCOMB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

LOUISE A. WHITCOMB, (LOUISE A. F. E. WHITCOMB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

LYDIA L. WHITCOMB, (LYDIA L. I. WHITCOMB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

ESTATE OF LOUISE P. V. WHITCOMB, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

CHARLOTTE A. W. LEPIC, (CHARLOTTE ANDREE WHITCOMB LEPIC), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket Nos. 16117, 16118, 16119, 16120, 16121, 16122, 27940, 27941, 27942, 27943, 27944, 46510, 46511, 46512 and 46513.

Promulgated February 11, 1931.

The petitioners are beneficiaries of a certain trust and entitled to the income thereof. The

trustee, in computing the net income of the trust for 1921 to 1926, inclusive, deducted certain amounts for exhaustion, wear and tear of the trust property, but distributed among the petitioners the amounts deducted for exhaustion, wear and tear, together with the net income so computed. Subsequently a court of competent jurisdiction in a proper suit brought by the remaindermen decided that the trustee should have retained the amounts for exhaustion, wear and tear of the trust property and ordered the petitioners to repay said amounts to the trustee. Held, that the amounts deducted for exhaustion, wear and tear of the trust property in the years 1921 to 1926, inclusive, were not income to the petitioners.

VINCENT K. BUTLER, JR., ESQ., ALFRED SUTRO, ESQ., and FELIX T. SMITH, ESQ., for the petitioners.

JOHN D. FOLEY, ESQ., for the respondent. [32]

These proceedings, which were duly consolidated for hearing and decision, are for the redetermination of deficiencies in income tax which the respondent has asserted as follows:

	1921	1922	1923	1924	1925	1926
Marguerite T. Whitcomb	$524.78	$562.61	$401.95	$373.43	$303.83	$494.25
Louise A. Whitcomb	524.78	562.61	401.95	373.43	303.83	494.25
Lydia L. Whitcomb	524.78	562.61	401.95	373.43	303.83	494.25
Est. of Louise P. V. Whitcomb	902.12	406.96	281.92	262.57	251.27	.....
Charlotte A. W. Lepic	2,416.21	2,909.40	2,399.50	2,757.60	2,006.36	3,278.99

The petitioners allege that the respondent erred in adding to their respective incomes as returned by them for the years mentioned, the depreciation sustained during those years by a certain trust estate of which they were beneficiaries.

FINDINGS OF FACT.

Louise P. V. Whitcomb was from some time in 1889 until her death on June 14, 1921, the widow of A. C. Whitcomb, deceased. The petitioner Charlotte A. W. Lepic is the daughter of the said A. C. Whitcomb, deceased. The petitioners Marguerite T. Whitcomb, Louise A. Whitcomb, and Lydia L. Whitcomb, are the widow and two children of Adolph Whitcomb, deceased, who was the son of A. C. Whitcomb, deceased. [33]

The said A. C. Whitcomb died in the year 1889, a resident of the State of California, leaving a last will and testament which was duly admitted to probate and record by the Superior Court of the State of California, in and for the City and County of San Francisco. Said last will and testament provided, among other things, as follows:

> 7th. I give to my hereinafter named Executor, Jerome Lincoln of said San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in Trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb one-third part

of the interest thereon or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her; one Adolph, born on or about the 23rd day of February, 1880, and the other Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants "per stirpes" of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in Section Six (6) of this Will, having reference to said Harvard College.

The said will contained no directions in regard to the manner in which the income from the trust should be computed, accounts kept, or depreciation provided for.

James Otis was appointed a trustee of said trust on February 23, 1896. He has acted as such trustee continuously since that date, and since the year 1905 he has been the sole trustee of said trust. [34]

The original trust estate consisted largely of cash, bonds, stocks and notes. On February 23, 1906, the trust estate consisted of bonds, corporate stocks, cash and promissory notes secured by mortgages, of a total value of more than $3,000,000, and certain parcels of real estate, most of which were in San Francisco. On April 18, 1906, the San Francisco

earthquake and fire occurred. All of the improvements on the San Francisco real estate owned by the trust were destroyed by the fire, including those on the large parcel at Eighth and Market Streets which the trust still owns, and on which the Hotel Whitcomb now stands. Some time after the San Francisco fire the trustee of the said trust adopted the policy of improving the real estate owned by the trust, and of converting the other assets of the estate to accomplish that purpose. As a result of said policy and of the acquisition of additional parcels of real estate, the assets of the trust for several years prior to 1921, and during the years 1921 to 1926, inclusive, consisted almost entirely of improved real estate, including the Whitcomb Hotel and its furniture and equipment. The last item represented an investment of more than $2,000,000.

During the years 1921 to 1926, inclusive, the trust estate suffered exhaustion, wear and tear, as follows:

1921	$43,003.16	1924	$39,258.00
1922	39,408.00	1925	39,108.00
1923	39,408.00	1926	55,833.00

The trustee or trustees of said trust made payments of the income from the trust in equal shares to the widow and two children of A. C. Whitcomb, [35] until the death of his son Adolph, which occurred on September 5, 1914. The testator's widow, Louise P. V. Whitcomb, died on June 14, 1921. During the years 1921 to 1926, inclusive, the income from said estate was paid as follows:

1921 1/3 to Louise P. V. Whitcomb until her death on June 14, 1921, and thereafter 1/9 to her estate;

1/3 to Charlotte A. W. Lepic until June 14, 1921, and thereafter 4/9;

1/3 to the widow and two children of Adolph Whitcomb, namely Marguerite T. Whitcomb, Lydia L. Whitcomb and Louise A. F. E. Whitcomb, until June 14, 1921, and thereafter 4/9;

1922) 1/9 to the estate of testator's widow,
) Louise P. V.Whitcomb;
1923)
)

1924) 4/9 to the testator's daughter, Charlotte W. Lepic;

and) 4/9 to the widow and two children of the
1925) testator's son, namely, Marguerite T. Whitcomb, Lydia L. Whitcomb and Louise A. F. E. Whitcomb.

1926 1/2 to testator's daughter, Charlotte A. W. Lepic;

1/2 to the widow and two children of the testator's son, namely, Marguerite T. Whitcomb, Lydia L. Whitcomb, and Louise A. F. E. Whitcomb.

The trustee of said trust filed fiduciary returns for the years 1921 to 1926, inclusive, and deducted in computing the net income of the trust for each year, the respective amounts above set forth, repre-

senting exhaustion, wear and tear sustained by the trust. The trustee, however, did not withhold from the beneficiaries to whom income payments were being made, the amounts represented in the depreciation deduction, and each of said beneficiaries received her ratable share thereof during the years involved herein, as well as in preceding years. [36]

From 1903 to 1928, inclusive the trustee, or trustees of said trust presented an annual account to the beneficiaries entitled to income payments, but did not file any account in the Superior Court of California, which has jurisdiction over the trust until its termination for the settlement of accounts and for other purposes.

On September 5, 1928, James Otis, as trustee of said trust, filed with the Superior Court in San Francisco, his account accompanied by a petition for its allowance. The account covered the period from February 23, 1903, to February 23, 1928, and it set out all of the payments made to the beneficiaries of said trust during that period.

The allowance and approval of said account was opposed by Napoleon Charles Louis Lepic and Charlotte de Rochechouart, children of Charlotte A. W. Lepic, one of the beneficiaries herein, who are two of the remaindermen entitled to part of the corpus of the trust upon the termination thereof, if they be then living. In their objections, which were duly filed with the Superior Court of the State of California, in and for the City and County

of San Francisco, they allege that the trust property had sustained depreciation during the years 1913 to 1927, inclusive, in the amount of $622,434.11; that no reserve or other provision for such depreciation had been made from the gross income of the trust estate; that said amount of $622,434.11 had been paid by the trustee to the beneficiaries of the trust entitled to the income therefrom, as income, thus impairing the trust property by that amount, and they prayed that the trustee be charged with that amount. All of the parties interested in said trust estate, including Harvard College, were notified of the filing of said account of said trustee, [37] and of said objections, and were represented by counsel at the hearing held thereon. On September 19, 1928, the Superior Court of the State of California, in and for the City and County of San Francisco, entered a decree in said matter, which is in part as follows:

> It is hereby ORDERED, ADJUDGED and DECREED that the objection of said Napoleon Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provision for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objections, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to-wit:

Year.	Amount.
1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

that James Otis, the said Trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said Trustee, to the effect that under and by virtue of the terms of said Trust it was the duty of said Trustee to make such disbursements without such deduction; that said Trustee [38] in making said disbursements without such deduction was entitled to rely upon said advice of the said counsel, and that said disbursements were so made by said Trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said

Charlotte de Rochechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or does attach to said Trustee or to said James Otis by reason of having made such disbursements, or any of them, without deductions.

It is further ORDERED, ADJUDGED and DECREED that the recipients of the income of said trust estate during the period from February 23, 1913, to February 23, 1927, repay to the said Trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said Trustee as a reserve for depreciation for each said years 1913 to 1927, both inclusive.

It is further ORDERED, ADJUDGED and DECREED that from and after the year ending February 23, 1927, and until the termination of said trust, the said Trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper.

On January 17, 1929, Louise A. Whitcomb, Marguerite T. Whitcomb, Lydia L. Whitcomb, Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart, executed and delivered to the said James Otis as trustee of said trust, their promissory notes for the amounts by which the distributions made to them exceeded the distribution which would have been made [39] had the trustee retained a reserve for depreciation of the trust property. Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart executed a joint note. The other notes were separate notes of the individuals concerned. These notes bear no interest and by their terms are payable at the termination of the trust, which will be upon the death of Charlotte A. W. Lepic. A payment of $10,700 has been made to the trust by the Estate of Louise P. V. Whitcomb.

The several petitioners in their returns of income for the years mentioned, did not include the amounts paid to them in those years by the trustee representing their proportionate share of the depreciation sustained and deducted on the fiduciary return of the estate. The respondent increased the income shown on the several returns by said proportionate share of said depreciation, and determined deficiencies in tax as hereinabove set forth.

OPINION.

MARQUETTE.—The sole question presented by the record herein is whether, under the circum-

stances set forth in the findings of fact, the petitioners in computing their respective incomes for the years 1921 to 1926, inclusive, should include therein that part of the amounts distributed to them by the trustee of the trust created by the last will and testament of A. C. Whitcomb, representing amounts deducted by the trustee in his fiduciary return on account of depreciation of [40] the trust property.

The pertinent statutory provisions are sections 219 (d) of the Revenue Act of 1921; 219 (b) (2) of the Revenue Act of 1924, and 219 (b) (2) of the Revenue Act of 1926.

1921 Act—Section 219 (d):

> * * * there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary.

1924 and 1926 Act—Section 219 (b) (2):

> There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the

> estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.

The intent of Congress in enacting the sections of law quoted was to tax each year to the beneficiary of any trust the share of the trust income which was distributable to him in that year, and to tax to the trustee in his fiduciary capacity any income which was not to be distributed. Anna M. Chambers, et al., 17 B. T. A. 820. We must therefore look to the will of A. C. Whitcomb to determine [41] what part of the income of the trust under consideration was distributable to the petitioners.

The trust which produced the income in question was created by the last will and testament of A. C. Whitcomb, and it and its trustee or trustees are within the jurisdiction of the Superior Court of the State of California, in and for the City and County of San Francisco, and the decree of that Court respecting the trust, when not reversed or modified by a tribunal having appropriate appellate jurisdiction, is binding upon all the parties interested in the trust. Its decrees with respect to the trust are also binding on the several Federal Courts.

Uterhart v. United States, 240 U. S. 598. That Court has determined and decreed that the trustee should have, prior to 1927, deducted from the gross income of the trust and retained in his possession amounts adequate to offset the depreciation of the trust property, and the trustee has been directed to deduct and retain amounts for depreciation in 1928 and thereafter. While the proceeding before the Superior Court may have been a friendly one, as is urged by counsel for the respondent, nevertheless all parties interested in the trust, including Harvard College, the contingent remainderman, were notified and appeared in person or by counsel, and the decree is binding on all of them and fixes the amount of income distributable to each beneficiary. Farewell v. Commissioner, 38 Fed. (2d), 791-795. And the judgment of the Court is that during the years 1921 to 1926, inclusive, the petitioners were entitled only to the income of the trust after deducting and setting [42] aside adequate amounts for depreciation of the trust property, and that they should repay to the trustee what they had received in excess of the proportionate share of the income so computed. In other words, no part of the payments made to them out of the amount deducted for depreciation belonged to them.

In the case of E. L. E. Brenneman, et al., 10 B. T. A. 544, we said in discussing a situation similar to the one here presented:

> We must, therefore, look to the will of L. A. Brenneman to discover what was the distribu-

table share of income of each of the petitioners. See Estate of Virginia I. Stern, supra. Paragraph (a) of the third clause of the will directs the trustees to "invest and from time to time re-invest the said trust estate * * *." And, in the same paragraph, it is provided that "the said trustees shall collect and receive the income or interest from said trust estate and pay out and disburse the same as hereinafter provided * * *." Paragraph (b) of the third clause directs the trustees "to set aside exclusively for the use of my wife, one-third of said trust estate * * * and to pay her annually during her natural life the net income or interest therefrom * * *." Paragraph (g) of the third clause directs that "when my son and daughter arrive at the age of twenty-one years the trustees shall annually thereafter pay to each of them his or her share of the income and interests on the trust estate, the payment to each to be proportionate to his or her share in said trust estate itself.

Prior to the years in question the trustees, with the acquiescence of the beneficiaries, interpreted the directions of the decedent to mean that only "net income" of the trust estate, as that term is used in the taxing statutes, should be distributed to the beneficiaries. Accordingly, they set up reserves to conserve the corpus of the trust. In 1917 and 1918, as well as the years in question, the trustees took deductions

for depreciation and depletion [43] of the oil-producing property and distributed to the beneficiaries only the net income so determined.

It is strenuously urged by the petitioners that the interpretation thus placed on the will cannot be collaterally attacked. It is undoubtedly true that as between the parties in interest an interpretation of long standing placed on the instrument by them will not be disturbed and the courts of Pennsylvania have so held. Appeal of Follmer, 37 Pa. 121; Hagerty v. Albright, 52 Pa. 274. We are not inclined therefore lightly to cast aside or disregard the interpretation placed upon the trust instrument by the parties thereto and adopt a contrary view as a basis for the taxes in question. See Grace Scripps Clark, 1 B. T. A. 491. We think that the decedent's will is susceptible of the interpretation placed thereon by the parties in interest and, consequently, we hold that the deductions for depreciation and depletion, the amounts of which are not in dispute, were properly taken by the trustees and do not constitute income to the beneficiaries. The respondent's action in restoring the amounts so taken as deductions by the trustees to taxable income of the respective beneficiaries is, therefore, reversed.

See also, Kate M. Simon, 10 B. T. A. 1186, John L. Whitehurst, 12 B. T. A. 1416; and Anna M. Chambers, et al., supra.

In the present proceeding the facts are much more favorable to the contention of the petitioners than were the facts in the Brenneman case, because in that case amounts for depreciation and depletion of the trust property were deducted and retained by the trustee pursuant to a construction placed upon the will by the beneficiaries, while in the instant proceeding the will was construed by the Courts and a decree entered announcing such construction and fixing the rights of the parties thereunder. [44]

It is also urged by counsel for the respondent that the beneficiaries have not repaid to the trustee the amounts which according to the decree of the Court were overpaid to them, but have given notes payable at the termination of the trust. This, however, does not in our opinion change the situation. The amounts in question did not belong to the petitioners, and in our theory of the law cannot be income to them. Whether the petitioners ever repay such amounts to the trustee is a matter between them and the trustee and the other parties interested in the trust.

It is our opinion that under the terms of the last will and testament of A. C. Whitcomb, the amount distributable annually to the petitioners herein during the years 1921 to 1926, inclusive, was the income of the trust computed by deducting from gross income amounts for depreciation of the trust property, and that the respondent erred in taxing to the

petitioners more than their proportionate share of the net income of the trust so computed.

Reviewed by the Board.

Judgment will be entered under Rule 50. [45]

MURDOCK (dissenting).—The decedent died in 1889 and the trust in question, so far as we know, began to function shortly thereafter. The account which was objected to covered only the period from February 23, 1903, to February 23, 1928. Prior accounts must have been approved in which there was no deduction for depreciation. Wear, tear and exhaustion of property, sometimes called depreciation, does not depend upon revenue acts. Yet, we see that the objection of those opposing the account related to depreciation which had been sustained from 1913 to 1927 only. 1913 was the first year that there was an income-tax act which might affect these petitioners. We must assume that during all of the years that the trust existed, up to the year 1928, the income from the trust property, undiminished by any amount representing depreciation, had been paid regularly to those having life estates. During the taxable years here in question no one made any objection to this action of the trustee, and he had the advice of counsel that under the terms of the trust it was his duty to distribute the full amount to those having life estates. The will made no specific provision for depreciation, and the general rule in such cases is that the life beneficiaries take all income undiminished by depreciа-

tion. In re Hoyt, 160 N. Y. 607, 55 N. E. 282; Devenney v. Devenney, 74 Ohio St. 96, 77 N. E. 688; Old Colony Trust Company v. Smith, Mass. , 165 N. E. 657; Blair v. Blair, 82 Kan. 464, 108 Pac. 827; Reed v. Longstreet, 71 N. J. Eq. 37, 63 Atl. 500; Dooley v. Penland, ... Tenn. ....., 300 S. W. 9. There is no reason to suppose that this testator in 1889 intended that the income from his estate should be reduced by depreciation before being distributed to the life beneficiaries. Gay v. Focke, 291 Fed. 721. No reserve [46] for depreciation was established or provided for by the trustee until several years after the taxable years involved. Then, apparently by mutual consent, a retroactive order of a Court was obtained as a result of which the trustee in January, 1929, for the first time, was enabled to show a reserve for depreciation of $622,-434.11 on his books although he had in his possession only $10,700 returned by the estate of Louise P. V. Whitcomb. Others to whom distributions had been made, including those who objected to the account, gave the trustee their notes bearing interest and payable only at the termination of the trust. These notes were supposed to restore to the trustee the balance of the amounts which had been distributed by him which in reality represented depreciation.

Louise P. V. Whitcomb, Charlotte A. W. Lepic and Marguerite T. Whitcomb were the petitioners in the case of Louise P. V. Whitcomb et al., 4 B. T. A. 80. That case involved the years 1917 to

1920. The petitioners there contended that under the same will which is involved in this case, the net income of the trust, the distributable share of which was taxable to the beneficiaries, was the statutory net income divided into the number of shares provided in the will. We there held, on April 23, 1926, that the life beneficiaries were taxable with their full distributable share of the income of the trust undiminished by depreciation. Marguerite T. Whitcomb appealed from the decision of the Board in that case as to the year 1918, to the Court of Appeals of the District of Columbia. The facts as to that year were similar to the facts before the Board in the present case. The Court in affirming the Board's decision, stated: [47]

> The appellant as life tenant in the trust estate was entitled to receive the full one-ninth of the income therefrom without regard to exhaustion or wear and tear of the corpus of the estate, and that is what appellant actually received from the trustee as her distributive share of the income. The trustee was not entitled to withhold any part of the income of the trust estate in order to make good the exhaustion or wear and tear of the capital assets of the estate; nor did the trustee in fact do so. Capital losses in such cases fall upon the reversioners or remaindermen, and not upon the life tenant. Therefore, the payment made by the trustee to appellant was in fact and law the distributive shares of the income to

which she was entitled as life tenant, and consisted in no part of capital depreciation restored to her. It was therefore taxable in her hands. This conclusion is not negatived by the fact that the trustee was entitled to enter deductions for capital losses or gains in his return for the trust estate as a single entity.

This decision of the Court was rendered on April 2, 1928. Prior thereto, on January 14, 1925, the Circuit Court of Appeals, First Circuit, had decided similarly in Baltzell v. Mitchell, 3 Fed. (2d) 428, cert. denied 268 U. S. 690. Thereafter, on September 5, 1928, the trustee filed the account and the question of his duty to reserve depreciation was raised for the first time. There was a close family relation between the life beneficiaries and the remaindermen who made the objections to the account. It is easily conceivable that the only benefit sought from the Probate Court proceeding was support for the position taken by the life beneficiaries in excluding from their income tax returns the amounts representing depreciation, and thus avoidance of the effect of the adverse decisions of this Board and of the Court of Appeals of the District of Columbia on their income tax liability for other years. During all of those years the petitioners actually received and enjoyed the amounts here in controversy, and during those years they had no reason to suppose that their enjoyment of these amounts would ever be ques-

tioned. The [48] only reason that even a semblance of question arose was because some of those persons who were enjoying the amounts, in effect, asked the Probate Court to hold that they had no right to enjoy them, and nobody objecting, the Court so held. Under such circumstances, I do not believe that they should be relieved from including as a part of their gross income the full amount which they received and enjoyed during each of the taxable years in question. Cf. Jackson v. Smietanka, 272 Fed. 970; Lucas v. American Code Company, 280 U. S. 445; Commissioner v. Sanford & Brooks, ... U. S. ..... If the trustee erred in failing to deduct depreciation before distributing the income of this trust, the error had its inception long prior to the taxable years in question and long prior to 1913. The amount returned to the trustee in 1928 and the amount of the notes delivered to him at that time, then represent only a part of the amounts erroneously distributed, and there was no reason for holding that it was the amounts they received in the taxable years which they returned. The order of the Court will, of course, have its effect prospectively upon distributions, but under the circumstances of this case I do not think it should be given retroactive effect to accomplish the purpose sought by these petitioners. Cf. Weiss v. Wiener, 279 U. S. 333; Rosenberger v. McCaughn, 25 Fed. (2d) 699.

SMITH, STERNHAGEN, PHILLIPS, ARUNDELL and BLACK agree with this dissent. [49]

United States Board of Tax Appeals,
Washington.

Docket No. 16120

ESTATE OF LOUISE P. V. WHITCOMB,
Deceased,

By

JOHN FREULER, Administrator,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to findings of fact and opinion promulgated February 11, 1931, the respondent herein, to-wit, on May 20, 1931, having filed a proposed redetermination for the period January 1 to June 14, 1921, and the petitioner on June 13, 1931, having filed notice of acquiescence to the said proposed redetermination, it is

ORDERED AND RECEIVED that there is a deficiency for the period January 1 to June 14, 1921, in the amount of $95.61.

Enter.

Entered June 25, 1931.

(Signed) JOHN MARQUETTE,
Member.

A true copy. Teste, B. D. Gamble, Clerk U. S. Board of Tax Appeals. [50]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES David Burnet, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, C. M. Charest, General Counsel, Bureau of Internal Revenue, and John D. Foley, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

The petitioner for review (hereinafter referred to as the Commissioner) is the duly appointed and qualified Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent (hereinafter referred to as the administrator) is an individual inhabitant of the City of San Francisco, State of California, and is the duly appointed and acting administrator of the Estate of Louise P. V. Whitcomb, deceased. Said Louise P. V. Whitcomb, hereinafter referred to as the taxpayer, was up to the date of her death, on June 14, 1921, a citizen and resident of the French Republic.

II.

The Commissioner determined a deficiency in income tax for the period from January 1, to June 14, 1921, in the amount of $723.60, and on March 23, 1926, in accordance with the provisions of sub-

division (a) of Section 283 of the Revenue Act of 1926, sent to said Louise P. V. Whitcomb by registered mail a notice of said deficiency. Thereafter the administrator duly appealed said notice of deficiency to the United States Board of Tax Appeals. Said appeal was heard by said Board on May 19, 1930. On February 11, 1931, said Board promulgated its interlocutory decision containing its findings of fact and opinion, and on June 25, 1931, entered its order of redetermination wherein it ordered and decided that there was a deficiency in income tax for the period from January 1, to June 14, 1921, in the amount of $95.61.

In the period from January 1, to June 14, 1921, said Louise P. V. Whitcomb was one of the beneficiaries of a trust established under the will of one A. C. Whitcomb, deceased. By the terms of said A. C. Whitcomb's will the income of the trust was required to be distributed among the beneficiaries thereof. During the calendar year 1921 the trust property sustained depreciation in the amount of $43,003.16. In distributing the [51] income of the trust among the beneficiaries, the trustee did not take into account the depreciation sustained by the property of the trust, but distributed to each beneficiary his or her proportionate part of the income of the trust without regard to any depreciation. The will of said A. C. Whitcomb was silent upon the question whether depreciation was to be taken into account in determining the income of the trust available for distribution among

the beneficiaries. On September 5, 1928, the trustee filed his account covering the period from February 23, 1913, to February 23, 1928, with the Superior Court for the City and County of San Francisco, California, together with a petition that the account be approved. The account was objected to by two of the remaindermen of the trust. On September 19, 1928, the Court entered a decree whereby it found that the trustee's action in not reserving necessary amounts for depreciation before distributing the income of the trust among the beneficiaries was improper and whereby it directed that the recipients of the income of the trust for the period from February 23, 1913, to February 23, 1927, pay back to the trustee the excess amounts received by them. The payment of $10,700.00 has been made on behalf of the Estate of Louise P. V. Whitcomb, but it does not appear from the record what year or years are covered by said payment.

III.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and order of redetermination promulgated and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision and order of redetermination and upon which he relies to reverse the said deci-

sion and order of redetermination so promulgated and entered by the Board of Tax Appeals, to-wit:

1. The Board erred in holding that the distributions made by the trustee to said Louise P. V. Whitcomb were not income to her in their entirety.

2. The Board erred in holding that the distributions of the income of the trust received by said Louise P. V. Whitcomb without diminution on account of depreciation sustained by the trust property were not taxable income to her in their entirety.

3. The Board erred in holding that a payment made in a subsequent year and not shown to have related to an alleged excessive depreciation in the taxable year had the effect of keeping any portion of the distribution in the taxable year from being income to the taxpayer.

4. The Board erred in holding that the decree of a Court passed in a subsequent year in a friendly suit to which the Government was not a party could affect the Government's right to income tax in the year in which the income was received.

5. The Board erred in not approving the deficiency proposed for assessment by the Commissioner. [52]

WHEREFORE, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the

clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

G. A. YOUNGQUIST,
Assistant Attorney General.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

United States of America,
District of Columbia—ss.

C. M. CHAREST, being duly sworn, says that he is General Counsel of the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

C. M. CHAREST.

Sworn and subscribed to before me this 21st day of December, 1931.

GEORGE W. KREIS,
Notary Public.

My commission expires November 12, 1932.

[Endorsed]: Filed December 22, 1931. [53]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: W. W. Spalding, Esq., Tower Building, Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22nd day of December, 1931, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of December, 1931.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 22nd day of December, 1931.

.....,

Respondent on Review.

W. W. SPALDING,

Attorney for Respondent on Review.

RAL

[Endorsed]: Filed December 22, 1931. [54]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable John J. Marquette, Member of the United States Board of Tax Appeals, on May 19, 1930, in San Francisco, California. V. K. Butler, Jr., Esq., Alfred Sutro, Esq., and Felix T. Smith, Esq., appeared for the respondent and John D. Foley, Special Attorney, Bureau of Internal Revenue, appeared for the petitioner.

Whereupon

JAMES OTIS,

a witness for respondent, testified as follows:

Direct Examination.

My name is James Otis. My address is 2231 Broadway, San Francisco, California. I am an importer and exporter, a member of the firm of Otis-McAllister Company. I am sole trustee of the trust created by the will of A. C. Whitcomb and have been so since 1896. I am the sole trustee. I recall that in 1928 I had occasion to prepare an affidavit setting out in narrative form the history of the trust estate investments made from the time of the creation of the trust until November, 1928, when the affidavit was made.

The witness identified a copy of said affidavit. Said copy was thereupon admitted in evidence as

respondent's exhibit No. 1, and is hereto attached as Appendix 1.

In 1928 I filed an account as trustee in the Probate Department of the Superior Court in San Francisco having jurisdiction of this trust. That is the account. The statements contained in that account and all the items listed therein are a correct statement and report of my trusteeship and of the payments made by me under it.

Said account was thereupon admitted in evidence as respondent's exhibit No. 2 and is hereto attached as Appendix 2.

I filed a petition for settlement of the account.

[55]

The witness then identified the petition of James Otis for the settlement of his 14th account as trustee and it was admitted in evidence as respondent's exhibit No. 3. It is hereto attached as Appendix 3.

The witness then identified "Objections to the 14th Account of James Otis as trustee, filed on behalf of Napoleon Lepic and Charlotte de Rochechouart." Said objections were thereupon admitted in evidence as respondent's exhibit No. 4 and are hereto attached as Appendix 4.

The witness then identified his answer filed to the objections to his account, which said answer was admitted in evidence as respondent's exhibit No. 5 and is hereto attached as Appendix 5.

The witness then identified a decree of the Superior Court of the State of California in and

for the City and County of San Francisco, settling the 14th account of James Otis as trustee, which said decree was admitted in evidence as respondent's exhibit No. 6 and is hereto attached to Appendix 6.

The witness then identified an amended order and decree settling the account, which said amended order and decree was admitted in evidence as respondent's exhibit No. 7 and is hereto attached as Appendix 7.

(By Mr. BUTLER.)

Q. The order and the decree and the amended order and decree settling the account directed the trustee to demand and obtain from the beneficiaries repayments of certain sums representing the amount of the depreciation reserve required to be set up by the Court, but which was decreed to have been paid improperly to the beneficiaries. Did you demand and obtain repayment from the beneficiaries, Mr. Otis?

A. I did.

Q. I exhibit to you, Mr. Otis, four promissory notes, which I will subsequently describe in detail, and ask you to identify them.

A. I do.

Q. Did you receive these notes from the persons who are described therein?

A. I did.

Q. Are the sums for which the notes are made the respective proportionate amounts of the depre-

ciation which you had paid to the beneficiaries, and which they were required to repay to you? [56]

A. They are.

The promissory note of Louise A. F. E. Whitcomb, dated January 17, 1929, payable to James Otis, trustee under the will of A. C. Whitcomb, deceased, was then admitted in evidence as respondent's exhibit No. 9 and is hereto attached as Appendix 9.

The promissory note of Marie Marguerite Thuret Whitcomb, dated January 17, 1929, payable to James Otis, trustee under the will of A. C. Whitcomb, deceased, was then admitted in evidence as respondent's exhibit No. 10 and is hereto attached to Appendix 10.

The promissory note of Lydia Louise Ida Whitcomb, dated January 17, 1929, payable to James Otis, trustee under the will of A. C. Whitcomb, deceased, was then admitted in evidence as respondent's exhibit No. 11 and is hereto attached as Appendix 11.

The promissory note of Charlotte Andree Whitcomb Lepic, dated January 17, 1929, payable to James Otis, in which note Napoleon Charles Louis Lepic and Charlotte de Rochechouart are named as joint makers, was then admitted in evidence as respondent's exhibit No. 8 and is hereto attached as Appendix 8.

The sums represented by these notes include the sums repayable to me with respect to the years 1921 to 1926. I also received a cash payment in

the amount of $10,700 from Mr. Freuler, the administrator of the estate of Mrs. Whitcomb, on behalf of said estate.

Mr. BUTLER.—Will it be stipulated that John Freuler, who is named in each of these promissory notes as attorney in fact of the respective makers was such attorney and is such attorney in fact? The original powers are on file with the Department, I believe.

Mr. FOLEY.—I so stipulate.

Mr. BUTLER.—The two notes which I have exhibited to Mr. Otis are two notes already introduced and identified, but they are signed by John Freuler, as guardian of Louise Ida Whitcomb and as guardian of Louise A. F. E. Whitcomb. Will it be stipulated that Mr. Freuler, as guardian, had authority to execute these notes and that he executed them as such guardian, and that the execution thereof was reported by him in his account in the matter of the guardianship proceedings in the Superior Court of San Francisco, and that the account was settled and the execution of the notes approved? I have certified copies of [57] the proceedings, and will be glad to exhibit them to counsel in support of the stipulation.

* * * * * * *

Mr. FOLEY.—That stipulation that you suggest is satisfactory.

On cross-examination the witness testified:

The only cash I have received from these beneficiaries is the payment of $10,700 from Mr. Freuler

as administrator of the estate of Louise P. V. Whitcomb. The others have given me notes which are payable at the termination of the trust. They have paid nothing on the notes up to date.

The Findings of Fact made by the Board of Tax Appeals insofar as they are not inconsistent with the foregoing are agreed to be correct and to be fully supported by substantial and competent evidence.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, C. M. Charest, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

W. W. SPALDING,
Attorney for Respondent on Review.

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 12th day of April, 1932.

JOHN J. MARQUETTE,
Member, United States Board of Tax Appeals.

[58]

APPENDIX 1.

EXHIBIT 1.

AFFIDAVIT OF JAMES OTIS, TRUSTEE OF THE TRUST CREATED BY THE WILL OF A. C. WHITCOMB, DECEASED.

State of California,
City and County of San Francisco—ss.

James Otis, being first duly sworn, deposes and says:

That A. C. Whitcomb, deceased, by his last will, appointed one Jerome Lincoln trustee of the trust by said last will created, with power of appointment on the part of said Jerome Lincoln. That on or about the 3rd day of September, 1891, the said Jerome Lincoln, acting under his said power of appointment, by an instrument in writing, duly executed, given and made, appointed Winfield S. Jones, Jerome B. Lincoln and this deponent to be his successors in the said trust. That on or about the 23rd day of February, 1896, the said Jerome Lincoln died and the said Winfield S. Jones, Jerome B. Lincoln and this deponent became the trustees of said trust. That thereafter said Winfield S. Jones and said Jerome B. Lincoln died. That at all times since their deaths and since the year 1905, said James Otis has been the sole trustee of said trust.

That the last will and testament of said A. C. Whitcomb, deceased, was in the words and figures set forth in Exhibit "A," hereto annexed and made

a part hereof as completely as if herein particularly set forth. That the decree of final distribution of said estate in the Superior Court of the State of California, in and for the City and County of San Francisco, was in the words and figures set forth in Exhibit "B," hereto annexed and made part hereof as completely as if herein particularly set forth.

That on April 11, 1890, the lot and improvements at Pacific and Davis Streets, in San Francisco, more particularly described in said decree of final distribution hereto attached, were of the value of $70,000. That prior to the San Francisco fire of April, 1906, this deponent and his predecessor trustee, acting on behalf of the said trust, constructed improvements on said lot at a cost of $128,737., which were totally destroyed by said fire. That in the year 1906, and in the months of September, October and December, this deponent collected insurance in the total amount of $54,500. for damages to said improvements caused by said fire. That between December 7, 1906, and March 19, 1908, this deponent, acting as trustee of said trust, constructed a class "C" building on said lot at a cost of $176,852., said building having an estimated life of forty years. That between December 23, 1919, and January 20, 1920, this deponent, acting as trustee of said trust, constructed an additional improvement upon said lot at a cost of $3,294., which additional improvement will last only for the remaining life of the building.

That on April 11, 1890, the lot and improvements at Broadway and Front Street, San Francisco, more particularly described in said decree of final distribution hereto attached, were of the value of $45,000. That said improvements were of slight value, and were destroyed by said fire of 1906. That no further improvements thereon were constructed by this deponent or his predecessor trustee prior to said San Francisco [60] fire. That on October 1, 1906, this deponent collected insurance in the amount of $4,900. for damages to said improvements caused by said fire. That in the year 1908 this deponent, acting as trustee of said trust, completed the construction of a building upon said lot, costing $122,846., said building having an estimated life of thirty-three and one-third years from said date. That between September 14, 1911, and January 24, 1913, this deponent, acting as trustee of said trust, constructed additional improvements thereto at a cost of $3,262., which improvements will last only for the remaining life of the building. That on May 6, 1919, said building was damaged by fire. That on January 21, 1919, this deponent, acting as trustee of said trust, completed the restoration of said building at a cost of $3,172.

That on April 11, 1890, the lot at Front and Green Streets, in San Francisco, more particularly described in said decree of final distribution hereto attached, was of the value of $45,000. That said lot remained in an unimproved condition at all times from said date until the San Francisco fire

of April, 1906. That between December 9, 1919, and January 20, 1920, this deponent, acting as trustee of said trust, constructed improvements upon the said lot at a cost of $25,408. That said improvements have an estimated life of thirty-three and one-third years from date of completion.

That on April 11, 1890, the lot and improvements at Market and Eighth Streets, in San Francisco, more particularly described in said decree of final distribution hereto attached, were of the value of $400,000. That prior to said San Francisco fire this deponent and his predecessor trustee, acting on behalf [61] of said trust, constructed improvements upon said lot at a cost of $118,259., which were destroyed by said fire. That in the year 1906, and in the months of September, October and December, this deponent collected insurance in the aggregate amount of $59,600. for damages to said improvements caused by said fire. That between June 5, 1906, and October 20, 1906, this deponent, acting as trustee of said trust, constructed improvements on said lot at a cost of $68,606. That between November 17, 1910, and May 26, 1913, this deponent, acting as trustee of said trust, constructed additional improvements on said lot at a cost of $713,385. That between March 31, 1916, and December 28, 1921, this deponent, acting as trustee of said trust, constructed additional improvements on said lot, costing $502,009. That between November 3, 1922, and December 30, 1924, this deponent, acting as trustee of said trust, constructed addi-

tional improvements on said lot at a cost of $295,238. That between March 14, 1923, and December 30, 1924, this deponent, acting as trustee of said trust, constructed additional improvements on said lot at a cost of $335,145. That said improvements are in the nature of a hotel with an estimated life of sixty years from March, 1917.

That in June, 1917, this deponent, acting as trustee of said trust, acquired improved property at Market and Eighth Streets, in San Francisco, in cancellation of the debt of a note of $163,000., and additional advances and costs in excess of $15,000. That the total value of said building was estimated to be $110,000., with an estimated life of eleven years from the date of acquirement.

That on November 21, 1917, this deponent, acting as trustee of said trust, acquired the Hotel Carlton, at Turk and Larkin Streets, San Francisco, by foreclosure proceedings in cancellation of a debt of $150,649., of which over $110,000 [62] is estimated as the cost of the building, said building having an estimated life of forty years from the date of acquisition thereof. That in 1920, during the months of January and February, this deponent received $160,000. from the sale of said lot and improvements.

That on November 21, 1917, this deponent acquired a lot on Grant Avenue fifty-seven feet north of Clay Street, in San Francisco, by foreclosure proceedings in cancellation of a debt of

$55,000. That on the same date this deponent sold said lot and received in exchange, in part payment, improved properties at 829 Broderick Street and 1622 McAllister Street, San Francisco. That the cost of the buildings on each of said lots to this deponent is estimated at $3,750. with an estimated life of ten years from the date of acquisition thereof. That on March 12, 1925, this deponent, acting as trustee of said trust, sold said property for $15,000.

That between the years 1916 and 1920, inclusive, this deponent, acting as trustee of said trust, purchased an auto bus and hotel furniture and fixtures at a cost in excess of $212,000.

That on March 23, 1917, and on January 7, 1920, this deponent, acting as trustee of said trust, sold water lots at Van Ness Avenue and Lewis Street, in San Francisco, for $29,000. and $38,000., respectively.

That most of the aforesaid assets and improvements were acquired and constructed by this deponent and/or his predecessor trustee, with proceeds derived from the conversion and sale of other capital assets of said trust. That most of the capital assets so sold and converted were bonds, mortgages [63] and other nonwasting and nondepreciating assets.

That on February 23, 1906, the following assets were held and possessed by this deponent as trustee of said trust.

That on said date this deponent, as trustee of said trust, owned bonds of the aggregate value of $1,762,000.

That on said date this deponent, as trustee of said trust, owned corporate stocks of an aggregate value of $83,482.50.

That on said date this deponent held $76,424.92, in cash for the account of said trust.

That on said date this deponent had $35,000. on deposit in savings banks for the account of said trust.

That on said date this deponent held promissory notes and mortgages due and owing to said trust in the aggregate amount of $1,126,000.

That on said date this deponent, as trustee of said trust, owned, in addition to the lots mentioned above and included in Exhibit "B," state title lands in San Francisco, valued at $1,200., Lake Merced lots, in San Francisco, valued at $6,300., and additional Northbeach lots, in San Francisco, valued at $11,150.

That between February 23, 1906, and the present date, all of the aforesaid promissory notes and mortgages, save one for $66,000., have matured and have been collected or foreclosed by this deponent as trustee of said trust, and all of said bonds have been sold or collected.

That at the present date the assets owned and held by this deponent as trustee of said trust consist almost entirely of improved real estate.

That at the present date the only unimproved real [64] estate held by this deponent as trustee of said trust consists of a lot at Front and Green Streets, San Francisco.

That at the present time the only promissory notes or mortgages held by this deponent, as trustee of said trust, consist of a mortgage in the sum of $66,000.

That at the present time the only bonds or securities held by this deponent, as trustee of said trust, consist in Spring Valley Water Company bonds in the amount of $15,000., and stock of Colusa County Bank, California, in the amount of $98,915.

That the aforesaid nondepreciable property consisting of unimproved realty, bonds, corporate stocks, bank deposits, cash on hand, promissory notes, and mortgages included among the assets of said trust on February 23, 1906, the aggregate value of which upon said date was $3,101,557.42, and the proceeds thereof, has practically all been applied in the erection and purchase of depreciating property consisting of improvements upon real property of said trust, and hotel furniture.

JAMES OTIS,
Trustee.

Subscribed and sworn to before me this 12th day of November, 1928.

[Seal] CHALMER MUNDAY,
Notary Public in and for the City and County of San Francisco, State of California. [65]

EXHIBIT "A."

I, Adolphus Carter Whitcomb of the City and County of San Francisco, State of California, United States of America, but temporarily stopping in Paris, France, do make this my last Olographic Will and Testament.

1st. I give to the San Francisco Protestant Orphan Asylum and to the Ladies Protection & Relief Society, both of said San Francisco, each the sum of Five Thousand Dollars, making in all the sum of Ten Thousand Dollars.

2nd. I give to Mrs. Sarah Brazer Berry, now or formerly of Washington City, D. C., the sum of Five Thousand Dollars; and, in addition, I release her from all indebtedness to me or my estate for her kindness to my brother and myself, after the May fire of 1861 at said San Francisco.

3rd. I give to Adolphus Darwin Tuttle of Hancock, New Hampshire, and to Henry Foster Whitcomb of Boston, Massachusetts, or to the survivor of them, One Hundred Thousand Dollars of my Chesapeake & Ohio Railroad Bonds to be held by them in *Trust,* nevertheless, to pay over semi-annually to my cousin Love Maria Whitcomb Willis, now or lately of Glenora, Yates County, New York, and to her daughter Edith, now or lately married, or to the survivor of them during their natural lives, the income therefrom, for their own separate use and behoof, free from the debts, charge or control of their husbands, with the remainder

or remainders thereof to their children, or grandchildren "per stirpes," if any be alive at the time of their death, and if none be alive, then the said remainder shall go to my heirs-at-law.

4th. I give to my wife, Louise Palmyre Vion Whitcomb, Two Hundred Thousand Dollars ($200,000) of my Chesapeake & Ohio Railroad [66] Bonds, and I recommend her not to dispose of them, or to convert them, without the distinct advice of my friend, Mr. Bruce.

5th. I give to the town of Hancock, New Hampshire, for the maintaining of a free, public and un-sectarian library Ten Thousand Dollars of my Chesapeake & Ohio Railroad Bonds, and, also, to the said town the further sum of Ten Thousand Dollars of said Bonds, one-half thereof, or such part by the said one-half as may be considered necessary, for the reclamation and embellishment of the "Common," so-called in the village of said Hancock, and the rest of said Ten Thousand Dollars as a fund, of which the income shall be used for the increase and maintenance of said reclamation and embellishment.

6th. I give to my nephew the said Adolphus Darwin Tuttle and to his son, Charles Whitcomb Tuttle, both of said Hancock, all my interest, whether real, personal or mixed, in the "Jimeno Rancho" so-called, wholly or partly in the Counties of Colusa and Sutter in said California, in all mortgages, contracts, debts or dues arising therefrom.

And I recommend to my said nephew to leave his portion thereof after his own death and the death of his wife, in *Trust* for the said Charles Whitcomb Tuttle and to his children, or descendants, if any be alive at the time of the death of his said son; and if there *by* none so alive, to Harvard College, Cambridge, Massachusetts, one-half of the income thereof, to be used by said College for the assistance of students of said College to complete their regular course therein, and the other half of the income thereof for the general uses of the College, apart, however, from any participation therein by the Divinity School. [67]

7th. I give to my hereinafter named Executor, Jerome Lincoln of said San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature, and not hereinbefore disposed of, after the payment of my debts, in *Trust,* nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb, one-third part of the interest thereof or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her: one Adolph, born on or about the 23rd day of February, 1880, and the other Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three third parts to the descendants "per stirpes" of the said two children, if any be alive at the time of the death of the said two children: and if none be alive at that time, to Harvard Col-

lege, in conformity with the provisions named or indicated in Section Six (6) of this Will, having reference to said Harvard College.

The said Lincoln is hereby authorized to pay out of said two-thirds parts, only such portion as he may deem meet, fit and proper for the education and maintenance of the two children, until they shall have arrived respectively at the age of twenty-one years, after which they shall be entitled to receive their portion of the yearly income or interest. And the said Lincoln is hereby authorized to appoint his successor or successors in this Trust.

Lastly, I hereby nominate the said Jerome Lincoln and the said Adolphus Darwin Tuttle as Executors of this Will, and I hereby expressly provide that no bond or bonds shall be required of them or either of them, for the performance of any duties under this will; and I hereby recognize the said two children of the said [68] Louise Palmyre Vion Whitcomb, born as aforesaid in or about 1880 and in or about 1882, as my children, and authorize them to take and bear my name.

IN WITNESS WHEREOF I have hereunto set my hand and seal to this Will, after having effaced the word "said" in the 11th line of the third page of this Will, all in my hand-writing, and upon six pages, numbered from one to six, this 11th day of July, One thousand Eight hundred and Eighty-seven (1887) at Paris, France.

Signed and Sealed in the presence of us, and in the presence of each other, who at the request of

the said A. C. Whitcomb, have hereunto set our hands the day and year last above written.
[Seal] ADOLPHUS CARTER WHITCOMB.
E. J. DE STA MARINA of San Francisco, Cala.
W. PEMBROKE FELRIDGE, Paris, France.
WM. F. NAST, St. Louis, Missouri. [69]

EXHIBIT "B."

In the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of
A. C. Whitcomb,
Deceased.

DECREE.

Jerome Lincoln and Adolphus Darwin Tuttle, executors of the will of Adolphus Carter Whitcomb, the above named decedent, having heretofore, to wit: on the 24th day of March, 1890, rendered and filed herein a true account and report of their administration of said estate, which account was for final settlement, and having filed with said account a petition praying that said account be settled, allowed and approved by this Court, and that final distribution of said estate be made to the persons entitled thereto; and said petition coming on regularly to be heard on the 7th day of April, 1890, proof having been made to the satisfaction of the Court that due and legal notice of the hear-

ing of said petition for settlement of said account and final distribution had been given according to law and in the manner and for the time heretofore ordered and directed by the Court, and the hearing of application for final distribution having been regularly continued until this day;

NOW, on this 11th day of April, 1890, it appearing to the Court that all claims and debts against said decedent, all taxes on said estate, and all debts, expenses and charges of [70] administration of said estate have been fully paid and discharged by the said executors; and it appearing that under and in accordance with the order and decree of this Court made on the 30th day of September, 1889, the executors have paid over, distributed and delivered to the several legatees under said will the legacies in said will bequeathed to them respectively, to wit:

To the San Francisco Protestant Orphan Asylum and to the Ladies' Protection and Relief Society, both of San Francisco, California, each the sum of Five Thousand ($5,000) Dollars.

To Mrs. Sarah Brazer Berry, of Washington, D. C., the sum of Five Thousand ($5,000) Dollars.

To Adolphus Darwin Tuttle, of Hancock, New Hampshire, One Hundred Thousand ($100,000) Dollars of Chesapeake and Ohio Railroad Bonds, to hold the same as sole trustee for the benefit of Love Maria Whitcomb Willis, cousin of the testator, of Glenora, Yates County, New York, and her daughter Edith, upon the trust in said will set forth,

Henry Foster Whitcomb, named in said will as co-trustee with said Tuttle, having declined to act as such trustee, and having refused and renounced said trust.

To Louise Palmyre Vion Whitcomb, widow of the testator, Two Hundred Thousand ($200,000) Dollars of the Chesapeake and Ohio Railroad Bonds.

To the town of Hancock, New Hampshire, Twenty Thousand ($20,000) Dollars of said Chesapeake and Ohio Railroad Bonds, upon the trust and for the purposes in said will set forth.

And it appearing that said estate has now been fully administered by said executors, and that all the steps in said administration have been regularly had and taken and that said estate is now ready for distribution and in a condition to be closed.

And it further appearing that at the time of making and [71] balancing the final account so rendered the residue of money in the hands of the executors was the sum of Eighty Thousand Six Hundred and Fifty-five 19/100 ($80,655.19) that the executors have since received the sum of Seventeen Hundred and Eighty-four 87/100 Dollars, and disbursed the sum of Twenty-one Thousand Five Hundred and Forty-seven 30/100 Dollars as appears by the supplemental account filed herewith, leaving a balance now in the hands of the executors of Sixty Thousand Eight Hundred and Ninety-two 78/100; and

it appearing that the said supplemental account is true and correct and supported by proper vouchers.

And it appearing that of the real and personal property so ready for distribution in the hands of the executors a part consists of thirty-one forty-eighths (31-48) parts of the real property known as the "Jimeno Rancho," as particularly described in the inventory, together with the W. ½ of the S. W. ¼ of section 11; and the E. ½ of the S. E. ¼ of section 10; and the N. E. ¼ of N. E. ¼ of section 15, township 12 N., R. 1 E., which had been purchased by the decedent and the said Hagar with moneys arising from the "Jimeno Rancho," and had been by them incorporated with and made a part of said ranch and of 31-48 parts of the mortgages, contracts, moneys, debts and dues arising therefrom, now standing of record in the name of George Hagar, of Colusa, and ready to be conveyed by the said Hagar, according to his declaration of trust, made by him in writing, to the proper devisees of the said will, and includes moneys therefrom already paid into the hands of the executors by the said George Hagar, which last described moneys amount to the sum of Thirty-one Thousand (31,000) Dollars, all of which interest in the "Jimeno Rancho" and mortgages, contracts, moneys, debts and dues are hereinafter particularly described.

And it further appearing that the said will of said de- [72] cedent contained among other the following clause:

"6. I give to my nephew, the said Adolphus Darwin Tuttle, and to his son, Charles Whitcomb Tuttle, both of said Hancock, all my interest, whether real, personal or mixed, in the 'Jimeno Rancho', so called, wholly or partially in the Counties of Colusa and Sutter in said California, in all mortgages, contracts, debts or dues arising therefrom, and I recommend to my said nephew to leave his portion thereof, after his own death and the death of his wife, in trust for the said Charles Whitcomb Tuttle and to his children or descendants, if any be alive at the time of the death of his said son; and if there be none so alive, to Harvard College, Cambridge, Massachusetts; one-half of the income thereof to be used by said college for the assistance of students of said college to complete their regular course therein, and the other half of the income thereof for the general uses of the college, apart howfrom any participation therein by the Divinity School."

And application having been made to this Court to make a construction of the said clause of the will and to adjudge and determine in its decree of final distribution whether the one-half part of the interest of the decedent in and to the real and personal property of the said "Jimeno Rancho" is, by the said will, devised and bequeathed to the said Adolphus Darwin Tuttle in fee simple absolute, without restraint upon his power of alienation, or whether the recommendation in the said clause contained creates a trust binding upon him and

operating to create a remainder after his death and the death of his wife in favor of Charles Whitcomb Tuttle, his children or descendants, or Harvard College: and the Court at the said hearing of the petition for final distribution having heard and considered the claims of the respective parties argued by Edward J. Pringle, Esq., and Jerome [73] B. Lincoln, Esq., who appeared for the said Adolphus Darwin Tuttle, and claimed that the devise to him was absolute and without trust or restriction upon his power of alienation, and Sidney V. Smith, Esq., who appeared for the adverse parties, claiming that a trust was imposed upon the said Adolphus Darwin Tuttle, and a remainder created after the death of the said Adolphus Darwin Tuttle and his wife; and testimony having been taken in open Court and argument of counsel had on behalf of the respective parties, and the Court being fully advised in the matter;

And it further appearing that in and by his said will the decedent devised and bequeathed all the rest and residue of his property, real, personal and mixed, excepting what property the decedent had in France, to the said Jerome Lincoln, upon the trust hereinafter by this decree declared and imposed;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that said supplemental account be, and the same is, hereby settled and approved, and it is further ordered, adjudged and decreed that the executors retain out of the

funds in their hands the sum of Fifty Dollars for payment of Clerk's fees and other expenses of closing the estate.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that thirty-one forty-eighths (31-48ths) of the real property in the Counties of Colusa and Yolo known as the "Jimeno Rancho," and of the mortgages, contracts, moneys, debts and dues arising, or that may arise therefrom, and the said sum of Thirty-one Thousand Dollars already paid therefrom into the hands of the executors by the said George Hagar be, and the same are, hereby distributed to the said Adolphus Darwin Tuttle and his son Charles Whitcomb Tuttle, of Hancock, New Hampshire, in fee simple absolute, to their own use and benefit, in equal shares. And the said George [74] Hagar, being present in open Court and admitting the trust aforesaid in favor of the devisees of the said will, is ordered, decreed and directed to make conveyance of the legal title thereof to the said Adolphus Darwin Tuttle and Charles Whitcomb Tuttle in fee simple absolute; the interest in the said "Jimeno Rancho" so distributed, and to be by the said Hagar conveyed, being described as follows:

Thirty-one forty-eighths (31-48) parts of Twenty-two Thousand and Sixty-one 08-100 Dollars ($22,061 08-100), the same being the moneys now in the hands of said George Hagar and arising from said "Jimeno Rancho."

LANDS IN THE COUNTY OF COLUSA.

The undivided thirty-one forty-eighths (31-48) parts of lands in the County of Colusa, State of California, being parts of the rancho known as the "Jimeno Rancho" standing in the name of George Hagar, of Colusa, bounded and described as follows:

1st. Tract of land commencing at a point where the western boundary line of the Jimeno Rancho, as patented by the United States, intersects the boundary line between the Counties of Yolo and Colusa, and running thence eastwardly, along the line between the said counties to the Sacramento River; thence northwardly up the said river and following the meanderings thereof until the same intersects the northern boundary line of township 13 north, range 1 east, Mount Diablo B. and M.; and running thence westwardly, along said township line until the same intersects the western boundary line of the Jimeno Rancho; and thence along said western boundary line to the point of commencement; containing 6,809 acres more or less.

2nd. Tract of land commencing at the southwest corner of Sect. 34, T. 14 N., R. 1 E., M. D. B. & M.; and running thence [75] eastwardly, along the southern line of Section 34, and the southern line of Section 35 of same township to the Sacramento River; and running thence northwardly up the Sacramento River, and following the meandering thereof to the line running east and

west, and intersecting Section 35 in the middle of said section; thence westwardly along the said middle line of Section 35 and the middle line of Section 34 to the western line of said Section 34; and thence southwardly along the westerly line of Section 34, to the place of commencement; being the south half of Section 34, the southwest quarter of Section 35, and the fractional southeast quarter of Section 35, as marked on the official surveys of the United States, containing 514 acres, excepting therefrom 4 acres sold to Reclamation District No. 108, and situated at the southeast corner of fractional southeast quarter of said Section 35, bounding upon the west base of the levee along the Sacramento River and the southerly boundary line of Section 35.

3d. Tract of land commencing at a point on the Sacramento River at the northeast corner of lands of George Woods, being near the middle east and west line of Section 13, Township 15 North, Range 1 West, M. D. M. B .& M., and running thence westwardly along said Woods' north line and the north line of Kilgore to the county road leading from Colusa to Meridian, near the middle east and west line of Section 14, same Township and Range; thence westwardly along said road and continuation thereof in a straight line to western boundary line Jimeno Patent in same Section 15; thence north a little more than 1½ miles to N. W. corner of Section 10, same Township and Range; thence east ½ mile along the south line of lands of Totman

& Tuson; thence north a little more than a mile to Sacramento River; thence down along and with the said river to a point of commencement; containing 2,366 acres.

4th. Tract of land commencing at northeast corner of southeast quarter of Section 9, Township 15 North, Range 1 West, M. D. B. & M.; thence westwardly ½ mile to the center of Section 9; thence [76] northwardly nearly 1½ miles along the eastern boundary line of lands of Peter Dolan to the Sacramento River; thence down along and with the Sacramento River about ½ mile to lands of ..... Tuson; thence southwardly along the west line of said lands of ..... Tuson to the northwest corner of Section 10, same Township and Range, thence south ½ mile to point of commencement, containing 427 and 66-100 acres.

5th. Tract of land commencing at northwest corner of Section 8, Township 15 North, Range 1 West, M. D. B. & M.; thence east along the northern boundary line of said section ½ mile; thence south along the eastern boundary line of the northwest quarter of Section 8 one-fourth of a mile; thence east through the middle of the northeast quarter of Section 8, and by a continuation in a straight line a little more than ½ mile to county road leading from Colusa to Meridian; thence in a general northwesterly direction along and with the center of said road a little more than ¾ of a mile to the southerly line of a tract of land of 1,280 acres,

known as the Belden Tract; thence northwestwardly along the said line of said Belden Tract about ¾ of a mile to lands of T. Marr; thence south about ¾ of a mile to point of commencement, containing 380 acres.

6th. Tract of land commencing at a point on the Sacramento River within Section 7, Township 16 North, Range 2 West, M. D. B. & M., which is the southeasterly corner of lands of Jo. Hamilton; thence west along the southerly line of said lands of Hamilton about 1½ miles to the county road leading from Colusa to Princeton; thence southerly and southeasterly along said county road about 1¾ miles to lands of J. B. de Jarnatt; thence northeasterly about 1¼ miles to the Sacramento River; thence up said river to point of commencement, containing about 1,100 acres. [77]

7th. Tract of land commencing at a stake marked L. M. 1 on the Sacramento River, on the dividing line between the Jimeno Rancho and the rancho known as Larkin's Children's Ranch; and running thence southwardly down the Sacramento River and along the meanderings thereof to a sycamore tree marked L. M. 8, in Section 24 of Township 17 North, Range 2 West, M. D. B. & M.; and thence due west to the western boundary line of the Jimeno Rancho of same township; thence north along said line of said Rancho 90 and 7-100 chains to the said dividing line between the Jimeno Rancho and the rancho of Larkin's children; and

thence eastwardly along said dividing line 131 and 30-100 chains to the point of commencement, containing 1,305 acres.

8th. Tract of land commencing at a point where the northerly line of Levee Street, as laid down on the Town Map of the Town of Colusa, intersects the county road from Colusa to Princeton, and running thence northwardly along said county road 825 feet to Sacramento River; thence southeastwardly down the said river, and following the meanderings thereof, to the point where the said river is intersected by the said northerly line of Levee Street, and thence westwardly along the said northerly line 770 feet to the point of commencement, containing 7¼ acres.

LANDS IN THE TOWN OF COLUSA.

The undivided thirty-one forty-eighths (31-48) parts of the following lands in the Town of Colusa, State of California, as per Official Map of the Town of Colusa, being portions of the Jimeno Rancho, all standing in the name of George Hagar, of Colusa: [78]

Whole Block	Block	1
Lots 2, 3, 4, 6, 7 and 8	"	2
" 1 and 2	"	3
" 6, 7 and 8	"	8
" 2, 3 and 8	"	9
" ½ interest in 4	"	9
Whole Block	"	10

Lots 1, 3 and 4	Block	12
" ½ interest in 2	"	12
" 3, 4 and 8	"	14
" 2 and 6	"	15
" ½ interest in 5 and 7	"	15
" 6 and 7	"	17
" 1, 2, 3, 5, 6 and 7	"	21
" 1, 2, 3 and 8	"	23
" ½ interest in 5	"	23
" 1, 2, 3, 4, 7 and 8	"	24
Whole Block	"	25
Lots 5, 6, 7 and 8	"	26
" 4	"	27
" ½ interest in 5 and 8	"	27
" 1, 3 and 4	"	28
" ½ interest in 2	"	28
" ½ interest in 1	"	29
" ½ interest in 1	"	30
" 4 and west half of 3	"	31
" west ½ of 1, 19 and 12 of east side of 2	"	32
" south ½ of 5 and east ½ of 6	"	32
Whole Block	"	37
Whole Block	"	38
Lots 1, 2, 3, 5, 6 and 8	"	39
" ½ interest in 4 and 7	"	39
" ½ interest in 8	"	41
" 8	"	45
Lots 8	"	46
" 8	"	47
" ½ interest in 6 and 7	"	47

Lots 6, 7 and 8	Block	48
" 3, 4, 5, 6, 7 and 8	"	49
" 1, 3, 4, 5, 6, 7 and 8	"	50
" 1, 2, 3, 5, 6, 7 and 8	"	51
" ½ interest in 4	"	51
" 2, 3, 4, 5, 6, 7 and 8	"	52
" 3, 5, 6, 7 and 8	"	53
" ½ interest in 1 and 4	"	53
" 3, 5, 6, 7 and 8	"	54
" ½ interest in 8	"	57
" 3, 4 and 6	"	58
" ½ interest in 7	"	58
" ½ interest in 7	"	59
" 3, 4, 5, 6, 7 and 8	"	60
½ interest in Whole Block	"	61
Whole Block	"	62
Lots, 1, 4, 5, 7 and 8	"	63
" ½ interest in 3 and 6	"	63
" 1, 2, 3, 4, 5, 6 and 8	"	64
" ½ interest in lot 7	"	64
" 1, 2, 3, 4, 5 and 7	"	65
" ½ interest in 6 and 8	"	65
Whole Block	"	66
Lots 1, 2, 5, 6 and 7	"	67
" 6	"	68
" 7	"	70
" ½ interest in 8	"	70

[79]

Lots 6	Block	71
Whole of Block	"	73
Whole of Block	"	74

Lots 1, 2, 3, 6 and 8	Block	75
Lots ½ interest in 4, 5 and 7	"	75
Whole of Block	"	76
Whole of Block	"	77
Whole of Block	"	78
Whole of Block	"	79
Lots 5, 6, 7 and 8	"	80
" 5, 6 and 7	"	81
" 7 and 8	"	82
" ½ interest in 2, 3 and 6	"	82
Whole of Block	"	83
" "	"	84
" "	"	86
" "	"	87
" "	"	88
" "	"	89
½ interest in Block	"	90
Whole of Block	"	91
Lots 2, 5, 6, 7 and 8	"	92
" 1, 2, 3, 5, 6 and 8	"	95
" ½ interest in 4 and 7	"	95
Whole of Block	"	96
" "	"	97
" "	"	98
" "	"	99
" "	"	100
Lots 2, 5, 7 and 8	"	101
" ½ interest in 1, 3, 4 and 6	"	101
Whole of Block	"	102
" "	"	103
" "	"	104

Whole of Block ..... Block 105
" " ..... " 106
" " ..... " 107
" " ..... " 108
" " ..... " 109
" " ..... " 110
" " ..... " 111
" " ..... " 112
" " ..... " 113
" " ..... " 114
" " ..... " 115
" " ..... " 116
" " ..... " 117
" " ..... " 118
" " ..... " 119
" " ..... " 120
" " ..... " 121
" " ..... " 122
" " ..... " 123
" " ..... " 124
" " ..... " 128
" " ..... " 129
" " ..... " 130
" " ..... " 131
½ interest in whole of ..... " 132

[80]

Whole of Block ..... Block 133
" " ..... " 134
" " ..... " 135
" " ..... " 136
" " ..... " 137

Whole of Block		Block	141
"	"	"	142
"	"	"	143
"	"	"	144
"	"	"	145
"	"	"	146
"	"	"	147
"	"	"	148
"	"	"	149
"	"	"	150

LANDS IN THE COUNTY OF YOLO.

The undivided thirty-one forty-eighths (31-48) parts of the following lands situated in the County of Yolo, State of California, standing in the name of George Hagar, of Colusa.

That certain piece or parcel of land, bounded and described as follows, to wit: Commencing at a point on the west bank of the Sacramento river where the same is intersected by the township line dividing townships 12 and 13 north, range 1 east, M. D. B. and M., also being the dividing line between the counties of Colusa and Yolo; thence running down along and with said river to a point where said river is intersected by a line running north and south through the center of Sec. 30, township 12 north, range 2 east; thence running south through the center of said Sec. 30, and by a continuation and in a straight line through a portion of Sec. 31, same township and range, to a slough known as "Sycamore Slough," said slough being the back or

westerly boundary line of the Jimeno Rancho; thence northwesterly along and with said slough and the back or westerly boundary line of said rancho to the north line of Sec. 22 in township 12 north, range 1 east, M. D. B. and M.: thence north 1¾ miles; thence west, ½ mile; thence north ¼ mile; thence west, ½ mile; thence north one mile to said township line between the counties of Colusa and Yolo, and thence east [81] along said township line to the point of commencement. Excepting therefrom five hundred and twenty-nine and six one hundredths acres, now or lately of J. P. Bullock, being the south ½ of south ½ of section 2; the south ½ of south ½ of section 3, and southeast ¼ of southeast ¼ of section 4, all in township 12 north, range 1 east, M. D. B. and M., and the irregular tract bounded on the north and east by the Sacramento river, and on the south by the Sacramento river and the southern boundary line of section 1, in the same township; and on the west by the western boundary line of said section 1. The said tract of land containing, after deducting the said exceptions, 5,615.54 acres.

The undivided thirty-one forty-eighths (31.48) parts of following promissory notes secured by mortgage:

Note of M. A. and O. J. Kilgore to Geo. Hagar for $1,326.68 for moneys due by said Kilgores, being debt arising from Jimeno Rancho, dated November 1st, 1883—$4,582., due one-third Nov. 1st, 1884-85-86, bearing interest, etc., 9 per cent. per annum,

balance due $1,326.68. The same being secured by mortgage upon portion of Jimeno Ranch sold to mortgagor.

Note of S. R. Murdock to Geo. Hagar for $200, for moneys due by said Murdock, being debt arising from Jimeno Ranch, dated Feb. 15th, 1888, due 12 months from date, bearing interest at ten (10) per cent. per annum, balance due Oct. 1st, 1889, $234. The same being secured by mortgage upon a portion of Jimeno Rancho sold to mortgagor.

Note of Jno. W. Browning to Geo. Hagar, for $13,367, for moneys due by said Browning, being debt arising from Jimeno Rancho, dated Oct. 31st, 1885, $32,300, due balance in 1889-90-91, bearing interest at 9 per cent. per annum, balance due Oct. 1st, 1889, $13,367,—$5000 paid Oct. 12th, 1889. The same being secured by [82] mortgage upon portion of Jimeno Rancho sold to mortgagor.

Note of E. G. Morton to Geo. Hagar for $14,000, for money due by said Morton, being debt arising from Jimeno Rancho, dated October 23rd, 1888, due 1889-90-91, bearing interest at 9 per cent. per annum, balance due, $14,000. The same being secured by mortgage upon portion of Jimeno Rancho sold to mortgagor.

Note of H. J. Thomas to Geo. Hagar for $600, for moneys due by said Thomas, being debt arising from Jimeno Rancho, dated Dec. 29th, 1888, due 1889-90-91, bearing interest at 10 per cent. per annum; balance due $600. The same being secured

by mortgage upon portion of Jimeno Rancho sold to mortgagor.

The undivided thirty-one forty-eighths (31-48) part of the following promissory notes:

Note of E. J. Sabin to Geo. Hagar for $500, for moneys due by said Sabin, being debt arising from Jimeno Rancho, dated Dec. 5th, 1888, due Dec. 6th, 1888, bearing interest at 10 per cent. per annum; balance due, $500.

Note of D. C. Kilgore to Geo. Hagar for $46.47, for moneys due by said Kilgore, being debt arising from Jimeno Rancho, dated Nov. 3d, 1887, due Nov. 4th, 1887, bearing interest at 10 per cent. per annum; balance due $46.47.

Note of J. C. Frasier to Geo. Hagar for $138, for moneys due by said Frasier, being debt arising from Jimeno Rancho, dated Dec. 31st, 1887, due January 1st, 1888, bearing interest at 10 per cent. per annum; balance due, $138.

Note of M. Wallrath to Geo. Hagar for $270, for moneys due by said Wallrath, being debt arising from Jimeno Rancho, dated Oct. 10th, 1888, due Oct. 11th, 1888, bearing interest at 8 per cent per annum; balance due $270. [83]

Note of S. S. Hine to Geo. Hagar for $97.55, for moneys due by said Hine, being debt arising from Jimeno Rancho, dated Feb. 25th, 1889, due Feb. 26th, 1889, bearing interest at 10 per cent per annum; balance due, $97.55.

Note of E. J. Morton to Geo. Hagar for $177.92 for money due by said Morton, being debt arising from Jimeno Rancho, dated Oct. 23rd, 1888, due Oct. 24th, 1888, bearing interest at 9 per cent per annum; balance due, $177.92.

The undivided thirty-one forty-eighth (31-48) parts of the following amounts due by sundry parties to Geo. Hagar for account of Jimeno Rancho, being debts arising from Jimeno Rancho, as follows, to-wit: From

Colusa Milling Co., accrued September 5th, 1889, $502.50

Adolph Entremont, accrued September 1st, 1889, $352.50

Cooper, accrued June 1st, 1889, $60.

D. N. Angier, accrued October 15th, 1888, balance due, $206.34

T. Marr, accrued February, 1889, $525.00

J. B. Danner, accrued February, 1889, $492.66

Colusa & L. R. R., accrued July and September, 1889, $508.84

The undivided thirty-one forty-eighths (31-48) part of the following lots of grain, product of the Jimeno Rancho:

1,197 sacks wheat, 162,960 pounds in Howell Davis' warehouse

824 sacks wheat, 117,930 pounds, same warehouse.

690 sacks of wheat, Mumma Bros.

533 " barley, Mumma Bros.

397 " " M. E. Phillips

300	sacks	barley, S. W. Boyer
333	"	wheat, S. W. Boyer
130	"	barley, J. M. Miller
516	"	wheat, J. M. Miller
2,261	"	" C. M. Mumma
289	"	barley, C. M. Mumma
504	"	wheat, Vincy
151	"	barley, Vincy
316	"	wheat, J. C. Frasier
526	"	barley, J. C. Frasier
708	"	barley, A. E. Potter
559	"	wheat, A. E. Potter

Together with thirty-one forty-eighths (31-48) parts of any other mortgages, contracts, moneys, debts or dues arising or that may arise from the said "Jimeno Rancho" and not herein particularly described.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that [84] all the rest and residue of the estate of said decedent, real, personal or mixed, of every kind and nature, now known or hereafter discovered, except what property the decedent may have in France, the said property in France never having come into the possession of the said executors, be, and the same is hereby distributed to Jerome Lincoln, of San Francisco, State of California, in trust, nevertheless, to pay over to the said wife of said decedent, Louise Palmyre Vion Whitcomb, one-third part of the interest thereof or income therefrom, for and dur-

ing her natural life, and the other two-thirds parts to the children of said decedent born of her—one, Adolphe Whitcomb, born on or about the 23rd day of February, 1880, and the other, Charlotte Andree Whitcomb, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants per stirpes of the said two children, if any be alive at the time of the death of the said two children, and if none be alive at that time to Harvard College, Cambridge, Massachusetts, one-half of the income thereof to be used by said college for the asistance of students to complete their regular course therein, and the other half of the income thereof for the general uses of the college—apart, however, from any participation therein by the Divinity School; but the said Jerome Lincoln is hereby authorized to pay out of said income only such portion as he may deem meet, fit and proper for the education and maintenance of the said two children until they shall arrive at the age of twenty-one years, after which time they shall be entitled to receive their portions of the yearly income or interest.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Jerome Lincoln be, and he is, hereby authorized to appoint a successor or successors in this trust. [85]

The following is a particular description of said rest and residue of said estate, so distributed to said Jerome Lincoln: $29,842.76/100 being balance of

moneys, to-wit: $60,842.76 less $31,000. distributed to A. D. and C. W. Tuttle.

REAL PROPERTY.

Lands in the City and County of San Francisco, State of California.

1st. Lot of land, commencing at the southeast corner of Davis and Pacific Streets, and running thence eastwardly along the southerly line of Pacific street one hundred and thirty-seven feet and six inches, thence at right angles southwardly one hundred and twenty feet to the northerly line of Clark street, thence westwardly along the said line of Clark street one hundred and thirty-seven feet and six inches to the easterly line of Davis street, and thence northwardly along said line of Davis street one hundred and twenty feet to the point of commencement.

2nd. Lot of land, commencing at the southeast corner of Broadway and Front streets, and running thence eastwardly along the southerly line of Broadway street ninety-one feet and eight inches, thence at right angles southwardly one hundred and twenty feet to the northerly line of Chambers street, thence westwardly along said line of Chambers street ninety-one feet and eight inches to the easterly line of Front street, and thence northwardly along said line of Front street one hundred and twenty feet to the point of commencement.

3rd. Lot of land, commencing at the southwest corner of Front and Green streets, and running

thence southwardly along the westerly line of Front street ninety-one feet and eight inches, thence at right angles westwardly two hundred and seventy-[86] five feet to the easterly line of Battery street, thence northwardly along said line of Battery street forty-five feet and ten inches, thence at right angles eastwardly one hundred and thirty-seven feet and six inches, thence at right angles northwardly forty-five feet and ten inches to the southerly line of Green street; thence eastwardly along said southerly line of Green street one hundred and thirty-seven feet and six inches to the point of commencement; being Beach and Water lots Nos. 2, 7 and 8.

4th. Lot of land, commencing at a point on the southeasterly line of Market street, distant thereon seventy-five feet southwestwardly from the southerly corner of Market and Eighth streets, running thence southwestwardly along said line of Market street two hundred feet; thence at right angles southeastwardly two hundred and seventy-five feet; thence at right angles northeastwardly one hundred and fifty-five feet, thence at right angles northwestwardly one hundred and five feet to the northwesterly line of Stevenson street; thence northeastwardly along said line of Stevenson street forty-five feet; thence at right angles northwestwardly one hundred and seventy feet to the point of commencement; being a portion of Block 414.

5th. Lot of land, commencing at the southeast corner of Van Ness Avenue and Lewis street, and running thence eastwardly along the southerly line

of Lewis street three hundred and eighty-four feet to the westerly line of Polk street; thence southwardly along said line of Polk street one hundred and thirty-seven feet and six inches; thence at right angles westwardly three hundred and eighty-four feet to the easterly line of Van Ness avenue, and running thence northwardly, along said line of Van Ness avenue one hundred and thirty-seven feet and six inches to the point of commencement; being the northern ½ of Western Addition Block No. 35. [87]

6th. Lot of land, commencing at the southeast corner of Van Ness avenue and Jefferson street, and running thence eastwardly along the southerly line of Jefferson street three hundred and eighty-four feet to the westerly line of Polk street; thence southwardly along said line of Polk street one hundred and thirty-seven feet and six inches; thence at right angles westwardly three hundred and eighty-four feet to the easterly line of Van Ness avenue; and running thence northwardly, along said line of Van Ness avenue, one hundred and thirty-seven feet and six inches to the point of commencement; being the northern half of Western Addition Block No. 37.

7th. Lot of land, commencing at point where the northerly line of Lewis street intersects the westerly line of Polk street extended northward; and running thence westerly, along the northerly line of Lewis street four hundred and twelve feet and six inches to the easterly line of Van Ness avenue extended northwardly; thence northwardly, along said extended line of Van Ness avenue to Ship's chan-

nel; thence at right angles eastwardly along Ship's channel four hundred and twelve feet and six inches to the westerly line of Polk street as extended northwardly; and thence southwardly, along said extended line of Polk street to the point of commencement.

8th. Lot of land, commencing at the southwest corner section 35, township 2 south, range 6 west; thence north, 40 chains; thence east, 15.83 chains; thence south, 40 chains; thence east, 15.83 chains; thence south, 40 chains; thence west, 15.83 chains to point of commencement; containing 63.32 acres, according to the official surveys of the United States.

9th. Lots of land, being Lots numbers four hundred and twenty-one (421), four hundred and twenty-two (422) and four hundred and twenty-three (423), of Gift Map number four (4), as delineated in the official surveys of the City and County of San Francisco.

10th. Lots of land, being the State title or reversionary title [88] of Lots numbers nineteen (19), thirty-nine (39) and forty-three (43) of the City Slip property of the City and County of San Francisco, as delineated upon the map of the official survey of said City and County.

PERSONAL PROPERTY.

Bonds and Script.

No. 1. 1230 First Mortgage gold bonds of the reorganized Chesapeake and Ohio Railway Co., of $1,000 each, bearing interest at 5 per cent. per annum and payable in fifty years.

No. 2. 1201 Richmond and Danville R. Co., debenture bonds of $1,000 each, due in 1927, bearing interest at the rate of 6 per cent. per annum, cumulative.

No. 3. 288 Richmond and Danville consolidated mortgage gold bonds of $1,000 each, due in 1936, bearing interest at the rate of 5 per cent. per annum.

Script on above without interest, par value $240.

No. 4. 325 Richmond and West Point Terminal Railway and Warehouse Co. gold trust bonds of $1,000 each, due in 1897, bearing interest at the rate of 6 per cent per annum.

No. 5. Central Trust Co. of New York, certificate of deposit of first mortgage bonds of the Shenandoah Valley Railroad Co. under plan of reorganization, par value $18,000.

No. 6. 12 First Mortgage 7% Land Grant and Sinking Fund Gold Bonds of the New Orleans, Baton Rouge and Vicksburg Railroad Co., at $1,000 each, due in 1902.

STOCK OF INCORPORATED COMPANIES.

100 shares of the capital stock of the Bank of California, in the name of Jerome Lincoln.

271 shares of the capital stock of Colusa Co. Bank stock, in the name of A. C. Whitcomb. [89]

Three (3) shares of the capital stock of the Colusa and Lake Railroad Company, in the name of A. C. Whitcomb, of par value of $100 each.

2,000 shares of 110 each, of the Tumacacori Mining and Land Company (Limited), certificate in name of Charles P. Posbon, not endorsed.

10 shares of Gold Canon Consolidated Mining Company, in the name of Jerome Lincoln.

4,310 shares of Gold Canon Consolidated Mining Company, in the name of A. C. Whitcomb.

95 shares of the capital stock of the Rock Island Gold and Silver Mining Company.

50 shares of the capital stock of the Bella Union Gold and Silver Mining Company.

300 shares of the capital stock of the La Grange Ditch and Hydraulic Mining Company.

200 shares of the capital stock of Eugene L. Sullivan Mining Company.

100 shares of the capital stock of the Chase and Cornwall Silver Mining Company.

25 shares of the capital stock of the La Esperanza Mining Company.

53 shares of the capital stock of the "420" Mining Company.

15 shares of the capital stock of the Echo Gold and Silver Mining Company.

10 shares of the capital stock of the St. Francis Precious Metal Mining Company.

141 shares of the capital stock of the Union Gold and Silver Mining Company.

240 shares of the capital stock of the Techattucup Silver and Gold Mining Company.

501 shares of the capital stock of the San Francisco Dock and Wharf Company. [90]

56 shares of the capital stock of the Die Vernon Silver Mining Company.

272½ shares of the capital stock of the Echo Extension Gold and Silver Mining Company.

2000 shares of the capital stock of the South Feather Water and Union Mining Company, standing in name of Jerome Lincoln.

Sixty-six (66) coupons of California War Bonds, being coupons of twenty-two (22) bonds, and being coupons No. three (3) due on January 1st, 1855; coupons No. four (4) due January 1st, 1856, and coupons No. five (5) due January 1st, 1857, amounting in all to the sum of $2,519.87.

Three (3) city warrants of the City of San Francisco for $1,000 each, issued and made payable to Jesse L. Wetmore for grading Powell Street, and made payable for delinquent taxes under the act

of May 30th, 1861, two of said warrants bearing date April 20th, 1854, and one bearing date September 20th, 1854.

PROMISSORY NOTES.

Note of E. L. Sullivan to Jerome Lincoln, dated August 1st, 1876, for $8,485.90, bearing interest at one per cent. per month; renewed May 1st, 1880.

Note of H. Gibbons to A. C. Whitcomb, dated September 1st, 1882, for $500, payable
bearing interest at the rate of

Dated, April 11th, 1890.

J. V. COFFEY,
Judge. [91]

APPENDIX 2.

EXHIBIT TWO.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

No. 7871 Old Series
No. 50,794 New Series

FOURTEENTH ACCOUNT OF JAMES OTIS, TRUSTEE UNDER THE WILL OF A. C. WHITCOMB, DECEASED, FROM FEBRUARY 23, 1903, TO FEBRUARY 23, 1928.

February 23, 1903, to February 23, 1904.

	Income Received	$183,369.46
	Expenses paid	62,757.84
1904		
February 23	To one-third of $120,611.62, balance Income Account from February 23, 1903, to February 23, 1904, credit account of Mrs. Louise Palmyre Vion Whitcomb	40,203.88
" "	To one-third of $120,611.62, balance Income Account from February 23, 1903, to February 23, 1904, credit account Countess Charlotte Andree Whitcomb Lepic	40,203.87

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1904			
February 23	To one-third of $120,611.62, balance Income Account from February 23, 1903, to February 23, 1904, credit account Adolphe Whitcomb	$ 40,203.87	
February 23, 1904, to February 23, 1905.			
	Income received	179,026.37	
	Expenses paid	47,475.41	
1905			
February 21	To one-third of $131,550.96, balance of Income Account from February 23, 1904, to February 23, 1905, credit account Mrs. Louise Palmyre Vion Whitcomb	43,850.32	
" "	To one-third of $131,550.96, balance of Income Account from February 23, 1904, to February 23, 1905, credit account Countess Charlotte Andree Whitcomb Lepic	43,850.32	
" "	To one-third of $131,550.96, balance of Income Account from February 23, 1904, to February 23, 1905, credit account of Adolphe Whitcomb	43,850.32	
February 23, 1905 to February 23, 1906.			
	Income received	187,543.97	
	Expenses paid	48,882.87	
1906			
February 21	To one-third of $138,661.10, balance of Income Account from February 23, 1905, to February 23, 1906, credit account Adolphe Whitcomb	46,220.36	

February 21	To one-third of $138,661.10, balance of Income Account from February 23, 1905, to February 23, 1906, credit account Mrs. Louise Palmyre Vion Whitcomb	$ 46,220.37
1906		
February 21	To one-third of $138,661.10, balance of Income Account from February 23, 1905, to February 23, 1906, credit account Countess Charlotte Andree Whitcomb Lepic	46,220.37
February 23,	1906, to February 23, 1907.	
	Income received	165,711.10
	Expenses paid	48,074.69
1907		
February 23	To one-third of $117,636.41, balance Income Account from February 23, 1906, to February 23, 1907, credit account Mrs. Louise Palmyre Vion Whitcomb	39,212.14
" "	To one-third of $117,636.41, balance Income Account from February 23, 1906, to February 23, 1907, credit account Countess Charlotte Andree Whitcomb Lepic	39,212.14
" "	To one-third of $117,636.41, balance Income Account from February 23, 1906, to February 23, 1907, credit account Adolphe Whitcomb	39,212.13

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February 23, 1907, to February 23, 1908.		
	Income received	$164,123.33
	Expenses paid	45,537.60
1908		
February 23	To one-third of $118,585.73, balance Income Account from February 23, 1907, to February 23, 1908, credit account Mrs. Louise Palmyre Vion Whitcomb	39,528.58
" "	To one-third of $118,585.73, balance Income Account from February 23, 1907, to February 23, 1908, credit account Countess Charlotte Andree Whitcomb Lepic	39,528.58
" "	To one-third of $118,585.73, balance Income Account from February 23, 1907, to February 23, 1908, credit account Adolphe Whitcomb	39,528.57
February 23, 1908, to February 23, 1909.		
	Income received	183,129.13
	Expenses paid	49,157.53
1909		
February 23	To one-third of $133,971.60, balance Income Account from February 23, 1908, to February 23, 1909, credit account Mrs. Louise Palmyre Vion Whitcomb	44,657.20
" "	To one-third of $133,971.60, balance Income Account from February 23, 1908, to February 23, 1909, credit account Countess Charlotte Andree Whitcomb Lepic	44,657.20

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1909		
February 23	To one-third of $133,971.60, balance Income Account from February 23, 1908, to February 23, 1909, credit account Adolphe Whitcomb	$ 44,657.20
February 23, 1909 to February 23, 1910.		
	Income received	$196,960.44
	Expenses paid	51,334.30
1910		
February 23	To one-third of $145,626.14, balance account Income Account from February 23, 1909, to February 23, 1910, credit account Mrs. Louise Palmyre Vion Whitcomb	48,542.05
" "	To one-third of $145,626.14, balance account Income Account from February 23, 1909, to February 23, 1910, credit account Countess Charlotte Andree Whitcomb Lepic	48,542.05
" "	To one-third of $145,626.14, balance account Income Account from February 23, 1909, to February 23, 1910, credit account, Adolphe Whitcomb	48,542.04
February 23, 1910, to February 23, 1911.		
	Income Received	197,134.18
	Expenses paid	50,856.30
1911		
February 23	To one-third of $146,277.88, balance, account Income Account from February 23, 1910, to February 23, 1911,	

	credit account Mrs. Louise Palmyre Vion Whitcomb	48,759.30

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1911		
February 23	To one-third of $146,277.88, balance account Income Account from February 23, 1910, to February 23, 1911, credit account Countess Charlotte Andree Whitcomb Lepic	$ 48,759.29
" "	To one-third of $146,277.88, balance account Income Account from February 23, 1910, to February 23, 1911, credit account Adolphe Whitcomb	48,759.29
February 23, 1911, to February 23, 1912.		
	Income received	183,291.02
	Expenses paid	45,560.72
1912		
February 23	To one-third of $137,730.30, balance account Income Account from February 23, 1911, to February 23, 1912, credit account Mrs. Louise Palmyre Vion Whitcomb	45,910.10
" "	To one-third of $137,730.30, balance account Income Account February 23, 1911, to February 23, 1912, credit account Countess Charlotte Andree Whitcomb Lepic	45,910.10
" "	To one-third of $137,730.30, balance account Income Account from February 23, 1911, to February 23, 1912, credit account Adolphe Whitcomb	45,910.10

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February 23, 1912, to February 23, 1913.

Income received	$202,451.14
Expenses paid	51,569.82

1913

February 23	To one-third of $150,881.32, balance account Income Account from February 23, 1912, to February 23, 1913, credit account Mrs. Louise Palmyre Vion Whitcomb	50,293.78
"	" To one-third of $150,881.32, balance account Income Account from February 23, 1912, to February 23, 1913, credit account Countess Charlotte Andree Whitcomb Lepic	50,293.77
"	" To one-third of $150,881.32, balance account Income Account from February 23, 1912, to February 23, 1913, credit account Adolphe Whitcomb	50,293.77

February 23, 1913, to February 23, 1914.

Income received	211,432.07
Expenses paid	52,032.63

1914

February 23	To one-third of $159,399.44, balance account Income Account from February 23, 1913, to February 23, 1914, credit account Mrs. Louise Palmyre Vion Whitcomb	53,133.15
"	" To one-third of $159,399.44, balance account Income Account from February 23, 1913, to February 23, 1914, credit account Countess Charlotte Andree Whitcomb Lepic	53,133.15

1914			
February 23	To one-third of $159,399.44, balance account Income Account from February 23, 1913, to February 23, 1914, credit account Adolphe Whitcomb	$ 53,133.14	
February 23, 1914, to February 23, 1915.			
	Income received		211,302.86
	Expenses paid		50,927.64
1915			
February 23	To one-third of $160,375.22, balance account Income Account from February 23, 1914, to February 23, 1915, credit account Mrs. Louise Palmyre Vion Whitcomb	53,458.41	
" "	To one-third of $160,375.22, balance account Income Account from February 23, 1914, to February 23, 1915, credit account Countess Charlotte Andree Whitcomb Lepic	53,458.41	
" "	To one-third of $160,375.22, balance account Income Account from February 23, 1914, to February 23, 1915, credit account Adolphe Whitcomb	53,458.40	
February 23, 1915, to February 23, 1916.			
	Income received		208,773.81
	Expenses paid		47,186.05
1916			
January 26	To amount credited "Undivided Income Account," as per account, being one-third of $120,338.28, balance account from February 23, 1915, to November 23, 1915	40,112.76	

February 23	To amount credited "Undivided Income Account," one-third of $41,249.48, [99] balance income for quarter ending February 23, 1916	$ 13,749.82
1916		
February 23	To one-half of $107,725.18, balance account Income Account February 23, 1916, credit account Mrs. Louise Palmyre Vion Whitcomb	53,862.59
" "	To one-half of $107,725.18, balance account Income Account February 23, 1916, credit account Countess Charlotte Andree Whitcomb Lepic	53,862.59
February 23, 1916, to February 23, 1917.		
	Income received	149,239.38
	Expenses paid	42,944.74
1917		
February 23	To one-third of $106,294.64, balance account Income Account from February 23, 1916, to February 23, 1917, credit account Mrs. Louise Palmyre Vion Whitcomb	35,431.55
" "	To one-third of $106,294.64, balance account Income Account from February 23, 1916, to February 23, 1917, credit account Countess Charlotte Andree Whitcomb Lepic	35,431.55
" "	To one-third of $106,294.64, balance account Income Account from February 23, 1917, credit account Undivided Income Account	35,431.54

February 23, 1917, to February 23, 1918.

Income received	119,585.75
Expenses paid	24,274.83

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1918

February 23	To one-third of $95,310.92, balance account Income Account from February 23, 1917, to February 23, 1918, credit account Mrs. Louise Palmyre Vion Whitcomb	$ 31,770.31
" "	To one-third of $95,310.92, balance account Income Account from February 23, 1917, to February 23, 1918, credit account Countess Charlotte Andree Whitcomb Lepic	31,770.31
" "	To one-third of $95,310.92, balance account Income Account from February 23, 1917, to February 23, 1918, credit account J. Henry Meyer, Administrator Estate of Adolphe Whitcomb, deceased	31,770.30

February 23, 1918, to February 23, 1919.

Income received	131,806.61
Expenses paid	33,827.62

1919

February 23	To one-third of $97,978.99, balance Income Account from February 23, 1918, to February 23, 1919, credit account Mrs. Louise Palmyre Vion Whitcomb	32,659.66

February 23,	To one-third of $97,978.99, balance Income Account from February 23, 1918, to February 23, 1919, credit account Countess Charlotte Andree Whitcomb Lepic	32,659.67
" "	To one-third of $97,978.99, balance Income Account from February 23, 1918, to February 23, 1919, credit account Estate of Adolphe Whitcomb, deceased	32,659.66

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February 23, 1919, to February 23, 1920.

	Income received	$152,693.72
	Expenses paid	43,661.63

1920

February 24	To one-third of $109,032.09, balance Income Account from February 23, 1919, to February 23, 1920, credit account Mrs. Louise Palmyre Vion Whitcomb	36,344.03
" "	To one-third of $109,032.09, balance Income Account from February 23, 1919, to February 23, 1920, credit account Countess Charlotte Andree Whitcomb Lepic	36,344.03
" "	To one-third of $109,032.09, balance Income Account from February 23, 1919, to February 23, 1920, credit account Estate of Adolphe Whitcomb, deceased	36,344.03

February 23, 1920, to February 23, 1921.

	Income received	174,693.95
	Expenses paid	46,414.11
1921		
February 23	To one-third of $128,279.84, balance Income Account from February 23, 1920, to February 23, 1921, credit account Mrs. Louise Palmyre Vion Whitcomb	42,759.94
" "	To one-third of $128,279.84, balance Income Account from February 23, 1920, to February 23, 1921, credit account Countess Charlotte Andree Whitcomb Lepic	42,759.95

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" "	To one-third of $128,279.84, balance Income Account from February 23, 1920, to February 23, 1921, credit account Estate of Adolphe Whitcomb, deceased	$ 42,759.95

February 23, 1921, to February 23, 1922.

	Income received	125,989.70
	Expenses paid	51,947.10
1922		
February 23	To balance account Mrs. Louise Palmyre Vion Whitcomb Income from February 23 to May 23, 1921	7,551.50
" "	To one-third of $42,437.15) To four-ninths of $31,605.45), balance income account from February	

	23, 1921, to February 23, 1922, credit account Countess Charlotte Andree Whitcomb Lépic	28,192.59
February 23	To one-third of $42,437.15) To four-ninths of $31,605.45), balance Income Account from February 23, 1921, to February 23, 1922, credit account Estate of Adolphe Whitcomb, deceased	28,192.58
" "	To balance account Income Account from November 23, 1921, to February 23, 1922, credit account Estate of Louise P. V. Whitcomb, deceased	1,751.81
" "	To balance Income Account, amount in hands of trustee for account Estate of Louise P. V. Whitcomb, deceased, or whom it may concern	8,354.12

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February 23, 1922, to February 23, 1923.

	Income received	$145,509.32
	Expenses paid	70,550.28
1923		
February 23	To four-ninths of $74,959.04, balance Income Account from February 23, 1922, to February 23, 1923, credit account Countess Charlotte Andree Whitcomb Lepic	33,315.13
" "	To four-ninths of $74,959.04, balance Income Account from February 23, 1922, to February 23, 1923, credit	

	account Estate of Adolphe Whitcomb, deceased	33,315.13
February 23	To one-ninth of $74,959.04, balance Income Account from February 23, 1922, to February 23, 1923, credit account Estate of Louise Palmyre Vion Whitcomb, deceased	8,328.78
February 23,	1923, to February 23, 1924.	
	Income received	153,347.88
	Expenses paid	68,368.45
1924		
February 23	To four-ninths of $84,979.43, balance Income Account from February 23, 1923, to February 23, 1924, credit account of Countess Charlotte Andree Whitcomb Lepic	37,768.63
" "	To four-ninths of $84,979.43, balance Income Account from February 23, 1923, to February 23, 1924, credit account of Estate of Adolphe Whitcomb, deceased	37,768.63

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1924		
February 23	To one-ninth of $84,979.43, balance Income Account from February 23, 1923, to February 23, 1924, credit account of Estate of Louise Palmyre Vion Whitcomb, deceased	$ 9,442.17

February 23, 1924, to February 23, 1925.		
	Income received	149,182.71
	Expenses paid	61,870.85
1925		
February 23	To four-ninths of $87,311.86, balance Income Account from February 23, 1924, to February 23, 1925, credit account Countess Charlotte Andrée Whitcomb Lepic	38,805.26
" "	To four-ninths of $87,311.86, balance Income Account from February 23, 1924, to February 23, 1925, credit account Estate of Adolphe Whitcomb, deceased	38,805.26
" "	To one-ninth of $87,311.86, balance Income Account from February 23, 1924, to February 23, 1925, credit account Estate of Louise Palmyre Vion Whitcomb, deceased	9,701.34
February 23, 1925, to February 23, 1926.		
	Income received	146,399.92
	Expenses paid	65,295.55
1926		
February 23	To balance Income Account from February 23, 1925, to February 23, 1926, credit account Countess Charlotte Andree [105] Whitcomb Lepic	$ 37,108.71
1926		
February 23	To balance Income Account from February 23, 1925, to February 23, 1926, credit account Estate of Adolphe Whitcomb, deceased	37,108.70

February 23	To balance Income Account from February 23, 1925, to February 23, 1926, credit account Estate of Louise Palmyre Vion Whitcomb, deceased	6,886.96
February 23, 1926, to February 23, 1927.		
	Income received	147,430.42
	Expenses paid	75,515.49
1927		
February 23	To balance Income Account from February 23, 1926, to February 23, 1927, credit account Countess Charlotte Andree Whitcomb Lepic	35,957.46
" "	To balance Income Account from February 23, 1926, to February 23, 1927, credit account Estate of Adolphe Whitcomb, deceased	35,957.47
February 23, 1927, to February 23, 1928.		
	Income received	146,171.27
	Expenses paid	73,576.76
1928		
February 23	To balance Income Account from February 23, 1927, to February 23, 1928, credit account Countess Charlotte Andree Whitcomb Lepic	36,297.25

[106]

1928		
February 23	To balance Income Account from February 23, 1927, to February 23, 1928, credit account Estate of Adolphe Whitcomb, deceased	$ 36,297.26

Dated, August 28, 1928.

JAMES OTIS,
Trustee. [107]

State of California,
City and County of San Francisco.—ss.

James Otis, being duly sworn, deposes and says: I am the surviving trustee under and by the will of said A. C. Whitcomb, deceased. The foregoing account being filed as and for the fourteenth account of the trusteeship of the trust estate created by said will is in all respects just and true, and according to the best of my knowledge, information and belief, contains a full, true and particular account of all receipts and disbursements on account of said trust estate from the 23rd day of February, 1903, to the 23rd day of February, 1928, and of all sums of money belonging to said trust estate and of all property real and personal, which have come into the hands of the trustees or which have been received by any other person or persons by my order or authority, and I do not know of any error or omission in the said account to the prejudice of any person or persons interested in said trust estate.

JAMES OTIS.

Subscribed and sworn to before me this 28th day of August, 1928.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [108]

APPENDIX 3.

EXHIBIT 3.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series
No. New Series

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

PETITION FOR SETTLEMENT OF FOURTEENTH ACCOUNT OF TRUSTEE.

The petition of James Otis, as trustee under the will of A. C. Whitcomb, deceased, respectfully shows:

That he is the surviving trustee of the trust created by the will of the above named decedent.

That said will was admitted to probate in the above entitled Court and estate of said decedent distributed upon certain trusts in said will set forth, and that your petitioner is the surviving trustee of said trusts.

That at various times your petitioner and his predecessors, as such trustee, filed their accounts in said Court and that said accounts were settled by said Court. That the last account so filed and settled was the thirteenth annual account of your petitioner as such trustee covering the period from February 23, 1902, to February 23, 1903, and settled, allowed

and approved by the Hon. J. V. Coffee, April 7, 1903. That all of said proceedings were had and taken prior to the fire of April 18, 1906, and that all the records of said proceedings in the above entitled Court have been destroyed. [109]

That subsequent to said thirteenth annual account, your petitioner filed in the above entitled Court no accounts as such trustee, but such accounts were rendered annually in writing to the beneficiaries of said trusts and accepted by them.

That the account filed herewith as the fourteenth account of your petitioner shows the amount of the receipts and disbursements of your petitioner, as such trustee, during the twenty-five years commencing February 23, 1903, and ending February 23, 1928. That the details of said receipts and disbursements are set forth in said accounts annually rendered to the beneficiaries of said trust and in the books and records of your petitioner. That said details are voluminous and that it is not practical for your petitioner to present said details or file them in this Court, but that your petitioner offers to produce the same in Court upon the hearing of this petition, and prays that they be deemed to constitute a part of said account as so filed.

WHEREFORE, your petitioner prays that the account filed herewith may be settled, allowed and approved as filed.

PILLSBURY, MADISON & SUTRO,
Attorneys for Petitioner. [110]

APPENDIX 4.

EXHIBIT 4.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series
No. 50,794 New Series

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

OBJECTIONS TO THE FOURTEENTH ACCOUNTS OF JAMES OTIS, TRUSTEE.

Napoleon Charles Louis Lepic and Charlotte de Rochechouart oppose the allowance and approval of the fourteenth account of James Otis, as trustee under the will of A. C. Whitcomb, deceased, filed in the above entitled matter, and by way of objection to said account respectfully show:

1. That opponents are beneficiaries of the trust under the will of said decedent and entitled, upon the termination of said trust, to take and receive, intact, from the trustee one quarter each of the trust estate.

2. That a great part of said trust estate is, and has been throughout the years 1913 to 1927, inclusive, invested in buildings and improvements subject to deterioration and depreciation and which have deteriorated and depreciated in value as follows:

Year	Amount
1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
Carried forward	101,817.00 [111]
Brought forward	$101,817.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00
Total depreciation	$622,434.11;

that no reserves or other provision for such depreciation have been made by the trustee from the gross income of the trust estate; that said sum of $622,434.11 has been paid out by the trustee to the beneficiaries of said trust entitled to the income thereof, as income, thus impairing in a like amount the principal of the trust estate; and that said sum of $622,434.11 is included in the payments to income beneficiaries set up in said fourteenth account and for which the trustee takes credit therein.

3. That upon sales of bonds and real property of the trust estate losses have been sustained as follows:

In 1922	$ 4,812.50
1923	22,955.19
1925	1,875.58
Total losses	$29,643.27

reducing the capital in said amount; that the trustee has made no provision out of the gross income of the trust estate to make good such losses of capital; and that the whole of [112] said gross income has been paid out by the trustee, according to said fourteenth account.

WHEREFORE, opponents pray that the trustee be charged with $622,434.11 for depreciation and $29,643.27 for losses suffered by the principal of the trust estate.

W. H. LAWRENCE,
Attorney for Opponents.

State of California,
City and County of San Francisco.—ss.

W. H. Lawrence being duly sworn, says that he is the attorney of Napoleon Charles Louis Lepic and Charlotte de Rochechouart, the opponents who present the foregoing objections in the above entitled matter; that the said objections are true; that both of the said opponents are absent from the City and County of San Francisco, where deponent

resides and has his office, and for that reason deponent makes this verification.

W. H. LAWRENCE.

Signed and sworn to before me this 6th day of September, 1928.

[Seal] MARIE FORMAN,

Notary Public in and for the City and County of San Francisco, State of California. [113]

APPENDIX 5.

EXHIBIT 5.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

No. 7871 Old Series,
No. 50,794 New Series.

ANSWER OF TRUSTEE TO OBJECTIONS TO FOURTEENTH ACCOUNT.

James Otis, as trustee under the will of A. C. Whitcomb, deceased, answering the objections of Napoleon Charles Louis Lepic and Charlotte de Rochechouart to his fourteenth account on file herein, admits, denies and alleges as follows:

I.

Admits the allegations in paragraph 1.

II.

Admits the allegations in paragraph 2, and in this behalf alleges that the disbursements made in said fourteenth account were made without deduction of reserves or other provision for the depreciation mentioned in said paragraph, under and pursuant to the advice of counsel learned in the law retained by said trustee, to the effect that under and

by virtue of the terms of said trust it was the duty of said trustee to make such disbursements without such deduction; that said trustee does not know now whether said advice was correct or not, and prays that this Court may decide upon the correctness of said claim [114] so advanced by objectors herein, for the future guidance of said trustee; that by reason of the fact that these payments have been made for many years without objection, in good faith and on the advice of counsel, it is neither fair, just nor equitable that said trustee be charged on account thereof, save and except to the extent that trustee may be able to reclaim from the recipients of said disbursements such amount as the Court may hold to have been erroneously paid to them.

III.

Admits the allegations of paragraph 3, and in this behalf alleges that since the creation of said trust, large gains and profits have been made through sales and other dealings in bonds and real property of the estate, and that said profits have been applied in increasing the capital of said trust estate; that such increases in the capital of said trust estate amount to a sum largely in excess of the amount stated in said paragraph, $29,643.27, and that if said sums mentioned in said paragraph are to be deducted from the income of the trust estate, then said other sums largely exceeding them are to be added to the amount distributable as in-

come of said trust estate, and the capital thereof reduced accordingly.

PILLSBURY, MADISON & SUTRO,
Attorneys for Trustee. [115]

State of California,
City and County of San Francisco.—ss.

James Otis, being first duly sworn, deposes and says: That he is the trustee named in the foregoing answer, that he has read said answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters, that he believes it to be true.

JAMES OTIS.

Subscribed and sworn to before me this 11th day of September, 1928.

[Seal] FRANK L. OWEN,
Notary Public, in and for the City and County of San Francisco, State of California. [116]

APPENDIX 6.

EXHIBIT 6.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series.
No. 50,794 New Series.

In the Matter of the Estate of
A. C. WHITCOMB,

Deceased.

ORDER AND DECREE SETTLING ACCOUNT.

James Otis, as Trustee under the will of A. C. Whitcomb, deceased, having on the 5th day of September, 1928, rendered for settlement his fourteenth account of his administration of said trust for the period from the 23rd day of February, 1903, to and including the 23rd day of February, 1928, and Napoleon Charles Louis Lepic and Charlotte de Rochechouart having on the 7th day of September, 1928, filed their objections in writing to the said account, and said account and said objections coming on regularly to be heard this 19th day of September, 1928, proof having been made to the satisfaction of the court that notice of the filing and hearing of said account has been given as required by law, and proof having been made and the court now finding that said account is in all respects full, true and correct, except as hereinafter stated:

It is hereby ORDERED, ADJUDGED and DECREED that the objection of said Napoleon

Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provision for annual depreciation for the years 1913 to 1927, both inclusive, [117] as set forth in said objection, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, according to the rates of depreciation as prescribed and used by the Government of the United States in connection with federal income tax returns, said amount for each of said respective years being as follows, to wit:

Year	Amount
1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

that James Otis, the said Trustee, made the disbursements as stated in his said fourteenth account

without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said Trustee, to the effect that under and by virtue of the terms of said trust it was [118] the duty of said Trustee to make such disbursements without such deduction; that said Trustee in making said disbursements without such deduction was entitled to rely upon the said advice of the said counsel, and that said disbursements were so made by said Trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said Charlotte de Rochechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or does attach to said Trustee or to said James Otis by reason of having made said disbursements, or any of them, without deductions.

It is further ORDERED, ADJUDGED and DECREED that the recipients of the income of said trust estate during the period from February 23, 1913, to February 23, 1927, repay to the said Trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in the said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said Trustee as a reserve for depreciation for each said years 1913 to 1927, both inclusive, by making, executing and delivering to said Trustee their respective promissory notes, payable without

interest at the termination of said trust to the order of the remaindermen under said trust as they may be determined to be at the time of the termination of said trust.

It is further ORDERED, ADJUDGED and DECREED that from and after the year ending February 23, 1927, and until the termination of said trust, the said Trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper. [119]

It is further ORDERED, ADJUDGED and DECREED that the objection contained in the third paragraph of the objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart, with reference to losses sustained on sales of bonds and real property, be, and the same is hereby, disallowed.

Done in open court this 19th day of September, 1928.

FRANK H. DUNNE,
Judge. [120]

APPENDIX 7.

EXHIBIT 7.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series.
No. 50,794 New Series.

In the Matter of the Estate of
A. C. WHITCOMB,

Deceased.

AMENDED ORDER AND DECREE SETTLING ACCOUNT.

James Otis, as Trustee under the will of A. C. Whitcomb, deceased, having on the 5th day of September, 1928, rendered for settlement his fourteenth account of his administration of said trust for the period from the 23rd day of February, 1903, to and including the 23rd day of February, 1928, and Napoleon Charles Louis Lepic and Charlotte de Rochechouart having on the 7th day of September, 1928, filed their objections in writing to the said account, and said account and said objections coming on regularly to be heard this 19th day of September, 1928, and Alfred Sutro, Esq., having appeared as counsel for James Otis, trustee under the will of A. C. Whitcomb, deceased, and W. H. Lawrence, Esq., having appeared as counsel for Napoleon Charles Louis Lepic and for Charlotte de Rochechouart, and Aylett R. Cotton, Esq., having appeared as counsel for John Freuler, as guardian

of the estate of Louise Adolphine France Emmanuelle Whitcomb, a nonresident minor, as guardian of the estate of Lydia Louise Ida Whitcomb, a nonresident minor, and as administrator of the Estate of Louise Palmyre Vion Whitcomb, deceased, and Clarence Shuey, Esq., having appeared as counsel for Countess Charlotte Andree Whitcomb Lepic and for [121] Marguerite Thuret Whitcomb, and Rufus Hatch Kimball, Esq., having appeared as counsel for Harvard College, and proof having been made to the satisfaction of the court that notice of the filing and hearing of said account has been given as required by law, and proof having been made and the court now finding that said account is in all respects full, true and correct, except as hereinafter stated:

It is hereby ORDERED, ADJUDGED and DECREED that the objection of said Napoleon Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provision for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objection, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to wit:

Year	Amount
1913	$23,751.00
1914	23,070.00

Year	Amount
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

[122]

that James Otis, the said Trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said Trustee, to the effect that under and by virtue of the terms of said trust it was the duty of said Trustee to make such disbursements without such deduction; that said Trustee in making said disbursements without such deduction was entitled to rely upon the said advice of the said counsel, and that said disbursements were so made by said Trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said Charlotte de Rochechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or

does attach to said Trustee or to said James Otis by reason of having made said disbursements, or any of them, without deductions.

It is further ORDERED, ADJUDGED AND DECREED that the recipients of the income of said trust estate during the period from February 23, 1913 to February 23, 1927, repay to the said Trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in the said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said Trustee as a reserve for depreciation for each said years 1913 to 1927, both inclusive.

It is further ORDERED, ADJUDGED AND DECREED that from and after the year ending February 23, 1927, and until the termination [123] of said trust, the said Trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper.

It is further ORDERED, ADJUDGED and DECREED that the objection contained in the third paragraph of the objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart,

with reference to losses sustained on sales of bonds and real property, be, and the same is hereby, disallowed.

Done in open Court this 19th day of September, 1928.

FRANK H. DUNNE,
Judge [124]

APPENDIX 8.

EXHIBIT 8.

$305,867.06 San Francisco, California, January 17, 1929.

For value received we, jointly and severally, promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust, to pay the sum of Three Hundred Five Thousand, Eight Hundred Sixty-Seven and 06/100 dollars ($305,867.06) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

CHARLOTTE ANDREE WHITCOMB LEPIC,
NAPOLEON CHARLES LOUIS LEPIC,
CHARLOTTE DE ROCHECHOUART,
By JOHN FREULER,
Their Attorney in Fact. [125]

APPENDIX 9.

EXHIBIT 9.

$118,353.85 San Francisco, California,
January 17, 1929.

For value received I promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust to pay the sum of One Hundred Eighteen Thousand, Three Hundred Fifty-three and 85/100 Dollars ($118,353.85) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

LOUISE A. F. E. WHITCOMB,
By JOHN FREULER,
Her Guardian. [126]

APPENDIX 10.

EXHIBIT 10.

$639,159.35 San Francisco, California,
January 17, 1929.

For value received I promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust to pay the sum of Sixty-Nine Thousand, One Hundred Fifty-Nine and 35/100 Dollars ($69,159.35) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

MARIE MARGUERITE THURET WHITCOMB,
By JOHN FREULER,
Her Attorney in Fact. [127]

APPENDIX 11.

EXHIBIT 11.

$118,353.85 San Francisco, California,
January 17, 1929.

For value received I promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust, to pay the sum of One Hundred Eighteen Thousand, Three Hundred Fifty-Three and 85/100 Dollars ($118,353.85) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

LYDIA LOUISE IDA WHITCOMB,
By JOHN FREULER,
Her Guardian.

[Endorsed]: Filed April 12, 1932. [128]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals

for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board,
   (a) Petition, including annexed copy of deficiency letter.
   (b) Answer.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of the evidence as settled and allowed.

6. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record. (Not included in Transcript.)

7. This praecipe.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 13th day of April, 1932.

[Seal] W. W. SPALDING,
Attorney for Respondent.

[Endorsed]: Filed April 14, 1932. [129]

[Title of Court and Cause.]

CLERK'S CERTIFICATE
TO TRANSCRIPT OF RECORD.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 129, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 25th day of April, A. D. 1932.

[Seal] B. D. GAMBLE,
Clerk.

[Endorsed]: No. 6835. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner vs. John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, Respondent. Transcript of the Record. Upon Petition to Review the Decision of the United States Board of Tax Appeals.

Filed May 4, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6835

United States
Circuit Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb,
Respondent.

Upon Petition to Review the Decision of the United States Board of Tax Appeals.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-eighth day of November in the year of our Lord one thousand nine hundred and thirty-two.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge; Honorable CHARLES C. CAVANAH, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Wm. Cutler Thompson, Special Assistant to the United States Attorney General, counsel for the petitioner, and by Mr. Felix T. Smith, counsel for respondent, and submitted to the Court for consideration and decision, with leave to counsel for respective parties to file further briefs 20 + 10.

At a stated term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the ninth day of January in the year of our Lord one thousand nine hundred and thirty-three.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable WILLIAM H. SAWTELLE, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed and that a judgment be filed and recorded in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS.

Before: WILBUR and SAWTELLE, Circuit Judges, and CAVANAH, District Judge.

CAVANAH, District Judge:

This is an appeal taken by the Commissioner of Internal Revenue to review a decision of the Board

of Tax Appeals which held that there was only a deficiency of $95.61 in income tax to be paid by respondent, administrator of the estate of Louise P. V. Whitcomb, deceased, for the fractional last year 1921. The amount of the tax involved was $723.60, of which respondent contested $675.77, which was sustained by the Board, leaving $627.99 now in controversy.

In 1889 A. C. Whitcomb died, leaving a will devising his estate in trust to be paid to his widow, the decedent, one-third of the interest or income for life and the other two-thirds parts to his two children with remainder over. There was a depreciation in the property of the estate and during the taxable fractional year 1921 one-third of this depreciation was $7167.19; however, during that fractional year the trustee under the will paid the decedent her share of the income without making any deduction for depreciation. The trustee divided the income of the estate among the heirs. Thereafter the residue legatees filed a petition in the Probate Court alleging that the payments so made were illegally made and that they should have been reserved for the purpose of taking care of the depreciation and depletion of the property. After a short period of time had elapsed from the time of the filing of the protests and the order of the State Court, an order was entered by the State Court directing that the money so distributed should be returned to the trustee. The beneficiaries who received the money gave their several promissory notes for their respective shares of the money, pay-

able at the death of the daughter of the testator and without interest. When the respondent made an income tax return for this fractional year in the name of decedent he set forth decedent's share of the net income after deducting the depreciation.

The question involved is as to the effect of the will under the circumstances presented with relation to whether the trustee should maintain a depreciation reserve and the amount to be dispersed annually should be the income of the trust computed by taking from the gross income the amount for depreciation of the trust property? Or in another way of stating it—whether the taxable status of the said income be retroactively changed by an order of the State Court in the settlement of the trustee's account some years later requiring the trustee to maintain such reserve, and the same to be deducted from the gross income of the estate.

The will provided, among other things,—

> "7th. I give to my hereinafter named Executor, Jerome Lincoln of said San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in Trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb one-third part of the interest thereon or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her; one Adolph, born on or about the 23rd day of February, 1880, and the other Charlotte An-

dree, born on or about the 4th day of December, 1882, with the reversion of remainder of the whole three-thirds parts to the descendants 'per stirpes' of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions, named or indicated in Section Six (6) of this will, having reference to said Harvard College."

It contained no directions in regard to the manner in which the income from the trust should be computed, accounts kept, or depreciations provided for.

Distribution was made under and pursuant to the instrument creating the trust for a period of thirty-eight years, including the tax year involved. That instrument in law and in fact controlled the distribution of the trust income.

In their returns of income the life beneficiaries under the will did not include the amounts paid to them by the trustee representing their proportionate share of the depreciation deducted on the fiduciary return of the trustee. The Commissioner, therefore, increased the income shown on the several returns by the proportionate share of the depreciation and determined the deficiency in tax in question.

The provisions of the statute which are pertinent are Sections 219 (d) of the Revenue Act of 1921; 219 (b) (2) of the Revenue Act of 1924, and 219 (b) (2) of the Revenue Act of 1926.

1921 Act—Section 219 (d):

> "* * * there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

1924 and 1926 Act—Section 219 (b) (2):

> "There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not."

It is clear that Congress when enacting the sections referred to intended to tax each year to the beneficiary of any trust the share of the trust income which was distributed to him in that year, and to tax to the trustee in his fiduciary capacity, any income which was not to be distributed.

There being no provision in the deed of trust or the federal or state statutes allowing to be deducted depreciation from the income of the trust estate, and the income in question representing depreciation having been received by the beneficiary, excepting the payment of $10,700 to the trustee by the estate of the respondent's decedent, and the year in which it was made does not appear, the principle then applicable is that where the beneficiaries receive the income, or in case they do not, the trust estate, is taxable upon the full amount of the income actually received during the year without deduction for depreciation sustained by the corpus of the trust. (Codman v. Miles, 28 F. (2) 823 (C. C. A. 4th); Kaufmann v. Commissioner, 44 F. (2) 144 (C. C. A. 3rd); Hubbell v. Burnet, 46 F. (2) 446 (C. C. A. 8th; Codman v. Commissioner, 50 F. (2) 763 (C. C. A. 1st); Roxburghe v. Burnet, 58 F. (2) 693 (App. D. C.); Baltzell v. Mitchell, 3 F. (2) 428 (C. C. A. 1st). The loss then due to depreciation under the record in the present case is borne by remaindermen in determining the tax.

The respondent urges that as the orders of the Probate Court requiring the amounts of the depreciation reserve so paid to respondent's decedent be repaid to the trust estate, they are binding upon the Federal Courts in determining what are proper deductions to be made under the income law. In this connection we must not forget that we are now considering the application of a federal income taxing statute to the objections and rights of parties in a testamentary trust of real property and not the

question of the construction of a state statute or rule of property rights by the highest Court of the state. We have here the consideration of orders of the Probate Court made after hearing objections of the remaindermen to the trustee's account. The account covered the period from 1903 to 1928 and was filed on September 5th, 1928. These orders were made on September 19, 1928, some six years after the taxable year 1921. During the years 1913 to 1926, inclusive, respondent's decedent and her estate received $151,554.63, which under the orders of the Probate Court was repayable to the trustee on account of depreciation reserve, and of this sum a payment of $10,700 was made to the trust by the estate of respondent's decedent. No evidence appears throwing any light upon the year to which this payment is to be attributed. However, no orders of the Probate Court, the effect of which would relate to what are deductions to be allowed under the national income taxing law, are conclusive and binding on the Federal Courts when in considering a revenue act, and the duty of such Courts is to exercise its own independent judgment.

In view of the conclusions thus reached the decision of the Board of Tax Appeals is reversed.

Reversed.

[Endorsed]: Opinion. Filed January 9, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit.

No. 6835.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb,
Respondent.

JUDGMENT.

Upon petition to review an order of the United States Board of Tax Appeals, this cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said Board of Tax Appeals in this cause be, and hereby is reversed.

[Endorsed]: Judgment. Filed and entered January 9, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred sixty-one (161) pages, numbered from and including 1 to and including 161, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the respondent and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 1st day of June, A. D. 1933.

[Seal] PAUL P. O'BRIEN,
Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5664

DAVID BURNET, Commissioner of Internal Revenue, Appellant,

v.

MARGUERITE T. WHITCOMB, by JOHN FREULER, Agent, Appellee

Appeal from the Board of Tax Appeals

(Argued March 13, 1933. Decided May 22, 1933)

G. A. Youngquist, Sewall Key, Wm. Cutler Thompson, C. M. Charest, Dewitt M. Evans, and John D. Foley, all of Washington, D. C., for appellant.

Claude R. Branch, of Boston, Mass., and W. W. Spaulding, of Washington, D. C., for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices.

OPINION

MARTIN, Chief Justice:

This appeal involves income taxes for the year 1921, and is prosecuted by the Commissioner of Internal Revenue from an order of redetermination of the Board of Tax Appeals.

The controversy relates to the estate of A. C. Whitcomb, deceased, a resident of the State of California, who died in the year 1889, leaving a last will which was admitted to probate by the Superior Court of San Francisco. The decedent left surviving him his widow, Louise P. V. Whitcomb, a daughter, Charlotte A. W. Lepic, and a son, Adolph Whitcomb. The latter died on September 5, 1914, survived by his widow, Marguerite T. Whitcomb, the respondent herein, and his children, Louise A. Whitcomb and Lydia L. Whitcomb.

Item seventh of decedent's will reads as follows:

"7th. I give to my hereinafter named executor, Jerome Lincoln, of said San Francisco, all the rest of my property,

real, personal, or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb, one-third part of the interest thereon or income therefrom for and during her natural life, and the other two-thirds parts to my two children, born of her: One, Adolph, born on or about the 23rd day of February, 1880, and the other, Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants 'per stirpes' of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in section six (6) of this will, having reference to said Harvard College."

The will contains no directions as to the manner in which the income from the trust shall be computed, and makes no provision relating to depletion nor a depletion reserve fund.

Since the year 1905 James Otis has served as trustee of the trust thus created. The original trust estate consisted largely of cash, bonds, stocks, and notes. On February 23, 1906, the trust estate consisted of similar securities of a total value of more than $3,000,000, together with certain parcels of real estate, most of which were in San Francisco. On April 18, 1906, the San Francisco earthquake and fire occurred. All of the improvements on the San Francisco real estate owned by the trust were destroyed by the fire. Some time after this the trustee adopted the policy of improving the real estate owned by the trust and of converting the other assets of the estate to accomplish that purpose. As a result of this policy and of the acquisition of additional parcels of real estate, the assets of the trust for several years prior to 1921, and during the years 1921 to 1926, inclusive, consisted almost entirely of improved real estate, including the Whitcomb Hotel and its furniture and equipment. The latter item represented an investment of more than $2,000,000.

During the years 1921 to 1926, inclusive, the trust estate suffered exhaustion, wear, and tear, as follows:

1921	$43,003.16	1924	$39,258.00
1922	39,408.00	1925	39,108.00
1923	39,408.00	1926	55,833.00

The trustee of the trust filed fiduciary income-tax returns for the years 1921 to 1926, inclusive, and deducted in computing the net income of the trust for each year the respective amounts above set forth, representing exhaustion, wear, and tear sustained by the trust. The trustee, however, did not withhold these amounts or any part of the income of the trust estate from the beneficiaries to whom income payments were due, and each of them received his undiminished share of the income of the trust. From 1903 to 1928 the trustee presented an annual account of his proceedings to the beneficiaries, but did not file any account in the Superior Court of San Francisco, which had jurisdiction over the trust. However, on September 5, 1928, the trustee filed with the court an account covering the period from February 23, 1903, to February 23, 1928, and setting out all of the payments made to the beneficiaries during that period. This was accompanied by a petition for its allowance.

The allowance of the account was opposed by Napoleon Charles Louis Lepic and Charlotte de Rouchechouart, children of Charlotte A. W. Lepic, one of the beneficiaries herein, who are two of the remaindermen entitled to part of the corpus of the trust upon the termination thereof, if they be then living. In their objections, which were filed with the court, they alleged that the trust property had sustained depreciation during the years 1913 to 1927, inclusive, in the amount of $622,434.11; that no reserve or other provision for such depreciation had been made from the gross income of the trust estate; that such amount of $622,434.11 had been paid by the trustee to the beneficiaries as income of the trust, thus impairing the trust property to that extent, and they prayed that the trustee be charged therewith. All of the parties interested in the trust estate were notified of the filing of the account and of the objections, and were represented by counsel at the hearing held thereon.

On September 19, 1928, the court entered an order in the matter which is in part as follows:

"It is hereby ordered, adjudged, and decreed that the objection of said Napoleon Charles Louis Lepic and Charlotte

de Rochechouart to said account that no reserve or other provisions for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objections, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to wit:

1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

"that James Otis, the said trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said trustee, to the effect that under and by virtue of the terms of said trust it was the duty of said trustee to make such disbursements with such deduction; that said trustee in making said disbursements without such deduction was entitled to rely upon said advice of the said counsel, and that said disbursements were so made by said trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said Charlotte de Rouchechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or does attach to said trustee or to said James Otis by reason of having made such disbursements or any of them without deductions.

"It is further ordered, adjudged, and decreed that the recipients of the income of said trust estate during the

period from February 23, 1913, to February 23, 1927, repay to the said trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said trustee as a reserve for depreciation for each of said years 1913 to 1927, both inclusive.

"It is further ordered, adjudged, and decreed that from and after the year ending February 23, 1927, and until the termination of said trust, the said trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income-tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper."

Thereupon, on January 17, 1929, Louise A. Whitcomb, Marguerite T. Whitcomb, Lydia L. Whitcomb, Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart, acting in conformity with the court's order, executed and delivered to the trustee their promissory notes for the amounts by which the distributions made to them exceeded the distribution which would have been made had the trustee retained a reserve for depreciation of the trust property. The notes were to bear no interest and were made payable at the termination of the trust—that is, upon the death of Charlotte A. W. Lepic.

The respondent in her return of income for the year 1921 did not include the full amount paid to her by the trustee, but omitted therefrom her proportionate share of the depreciation deducted on the fiduciary return of the estate. The Commissioner increased the income shown on the return by such proportionate share of the depreciation and determined a deficiency in tax accordingly. The Board of Tax Appeals, six members dissenting, reversed and set aside the determination of the Commissioner, who then appealed for a review by this court.

The question at issue is whether respondent, as life beneficiary under the testamentary trust aforesaid, is entitled to a deduction for depreciation of the corpus of the trust, notwithstanding that she received from the trustee her full

share of the accruing income of the trust undiminished because of depreciation or otherwise. The statute involved reads as follows:

"Revenue Act of 1921, c. 136, 42 Stat. 227

"Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including——

* * * * * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * * * *

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust."

The present issue may be considered first as the case stands without regard to the decision of the California court. The authorities up to that time were unanimous in support of the proposition that a life beneficiary of a trust estate is taxable upon the full amount of income actually received by or distributable to him during the taxable year,

without deduction for depreciation sustained by the corpus of the trust.

In Baltzell v. Mitchell, 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690, it was held that under the Revenue Act of 1918, sec. 219, subd. (d), the life beneficiary of the income of a trust estate is taxable on the income actually received by or distributable to him, without deduction for losses to the capital of the estate incurred during the year. In Abell v. Tait, 30 F. (2d) 54 (C. C. A. 4th), a case presenting similar facts, a similar decision was reached.

In the case of Whitcomb v. Blair, 25 F. (2d) 528, involving the same beneficiary, the same trust, and the same question as is presented in the present case, although for a prior taxable year, we held against the claim of the life beneficiary in the following terms:

"The appellant as life tenant in the trust estate was entitled to receive the full one ninth of the income therefrom, without regard to exhaustion or wear and tear of the corpus of the estate, and this is what appellant actually received from the trustee as her distributive share of the income. The trustee was not entitled to withhold any part of her share of the income of the trust estate in order to make good the exhaustion or wear and tear of the capital assets of the estate; nor did the trustee in fact do so. Capital losses in such cases fall upon the reversioners or remaindermen and not upon the life tenant. Therefore, the payment made by the trustee to appellant was in fact and law the distributive share of the income to which she was entitled as life tenant and consisted in no part of capital depreciation restored to her. It was therefore taxable in her hands. This conclusion is not negatived by the fact that the trustee was entitled to enter deductions for capital losses or gains in his return for the trust estate as a single entity."

In Kaufman v. Commissioner, 44 F. (2d) 144 (C. C. A. 3rd), the foregoing decision was cited with approval and the court declined to sanction a deduction to a life tenant for depreciation of buildings, part of the corpus of the trust. In Hubbell v. Burnet, 46 F. (2d) 446 (C. C. A. 8th), certiorari denied, 283 U. S. 840, the decision in Whitcomb v. Blair, supra, was cited with approval and the court held that although certain amounts of depreciation were actually set aside by the trustee, their retention was unauthorized

and that they were "distributable" and accordingly were subject to tax. In Codman v. Miles, 28 F. (2d) 823 (C. C. A. 4th), certiorari denied, 278 U. S. 654, the court declined to allow a deduction from the amount actually distributed to a life beneficiary on account of the exhaustion of the corpus, pointing out that such a course of action "would invite as well as permit, to an unlimited extent, subterfuges whereby those entitled to large incomes could avoid their just obligations to the Government." In Codman v. Commissioner, 50 F. (2d) 763 (C. C. A. 1st), involving the same trust as in Codman v. Miles, supra, a similar conclusion was reached. In Roxburghe v. Burnet, 61 App. D. C. —, 58 F. (2d) 693, certiorari denied, 286 U. S. 567, and in Mary Roxburghe v. United States, 64 Ct. Cls. 598, both cases relating to the same taxpayer but to different tax years, the taxpayer claimed a deduction of three per cent from income actually received by her from the trustee on account of depreciation of houses composing the trust property, and the claim was denied in both cases.

The question next arises whether the decision of the California court has made this case an exception to that rule. We think it has not. That decision does not rest upon an interpretation of any statute of California, nor can it be said to rest upon an interpretation of the testator's will.

In American Security and Trust Company v. Paine, 33 App. D. C. 178, we held that in construing a will for the purpose of determining whether it is the duty of the trustee thereunder to pay the entire income derived from a trust fund to the life tenant, or to make certain deductions therefrom for the benefit of the remainderman, the question involved is not to be determined by any arbitrary rule, but by ascertaining, if possible, the meaning and intention of the testator from the language employed in the creation of the trust, from the relation of the parties to each other, their condition, and the surrounding facts and circumstances of the case.

It is fair to assume in this case that had the testator intended that the trustee should establish such a reserve fund for depreciation, there would have been apt and effective language in the will to declare that purpose. By the terms of the will the testator undertook to provide for his widow and his two children primarily. They were the principal and immediate objects of his bounty, and it is unrea-

sonable to believe that he intended that the annual payments of income to them should be made dependent upon the vicissitudes attending the corpus of the fund. At the time of the execution of the will the testator's assets consisted almost*ly* entirely of notes, bonds, and other like property. It was not until many years after the death of the testator that the assets were in large part converted into improved real estate and the subject of depreciation became one of present importance.

The trustee continued the control of the trust from 1903 to 1928, making annual accounts with the life beneficiaries of the trust, and it appears that during those years no action was taken to establish a reserve for depreciation; nor did the trustee during all of that period file any account of his proceedings with the probate court having jurisdiction over the trust estate. In the year 1928 for the first time, following shortly after the decision of this court in the case of Whitcomb v. Blair, supra, the trustee filed an account in the probate court, and the court ordered the trustee to establish a reserve fund for depreciation and determined the amount thereof for the years 1913 to 1927. The life beneficiaries were ordered to refund that amount to the trustee. They did this by executing promissory notes bearing no interest, and payable at the termination of the trust.

It is claimed in effect that this record conclusively establishes the right of the life beneficiaries to deduct from their income-tax returns for the years 1921 to 1926, inclusive, the amounts found to be due in those years to the trustee for the reserve fund for depreciation.

We are of the opinion, however, that the order of the probate court made in the settlement of the trustee's account is not sufficient authority to overcome the general rule theretofore established under the Federal income-tax law. There are many decisions showing the mutual respect exhibited by the Federal and State courts in dealing with one another's decisions. It seems needless in this case to enter into a discussion of them, for in our opinion the bare statement of the facts in this case shows that we may without disrespect to the California probate court follow the ruling which this court, respecting this identical trust, reported prior to the decision of that court, and which has since been approved and adopted by the other Federal courts above named.

In Ford v. Commissioner, 51 F. (2d) 206 (C. C. A. 6th), certiorari denied, 284 U. S. 666, it appeared that the executors of an estate which consisted mostly of stocks made a partial distribution in 1920 of the stocks and the legatees received the dividends therefrom in 1922. The probate court in 1926 held the distribution to be premature and ordered the legatees to account for the principal and income of the stocks from the date of distribution up to December 31, 1922. The matter was handled entirely by book entries. The court in passing upon the matter said, in part:

"We think these 1922 dividends were taxable income received by the petitioners during that year. Certainly they then had complete legal title to the stock and to the dividends. If taxes regularly assessed could be invalidated, an indefinite number of years later, by a consent judgment purporting to vacate the title of the taxpayer to the fund he had reported as income, the necessary system of tax collection would be much impaired. The true normal criterion to be applied in this class of case is the actual receipt and retention during the year in question of what was then considered to be income, not whether the taxpayer exposed himself to possible personal liability."

In Fidelity and Columbia Trust Company v. Lucas, 52 F. (2d) 298, the court said:

"Furthermore, it is well settled that a decision of a State court, establishing a local rule of property or construing a State statute or a contract made after the rights of a litigant in a Federal court suit had accrued, and in a case to which he was not a party, is not binding upon the Federal court."

See also Kuhn v. Fairmont Coal Company, 215 U. S. 349.

Our conclusion herein follows the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Commissioner v. Freuler, decided January 9, 1933, which related to the identical issue now before us. In respect to the decision of the California court, it says:

"The respondent urges that as the orders of the probate court requiring the amounts of the depreciation reserve so paid to respondent's decedent be repaid to the trust estate,

they are binding upon the Federal courts in determining what are proper deductions to be made under the income law. In this connection we must not forget that we are now considering the application of a Federal income taxing statute to the objections and rights of parties in a testamentary trust of real property and not the question of the construction of a State statute or rule of property rights by the highest court of the State. We have here the consideration of orders of the probate court made after hearing objections of the remaindermen to the trustee's account. The account covered the period from 1903 to 1928 and was filed on September 5, 1928. These orders were made on September 19, 1928, some six years after the taxable year 1921. * * * However, no orders of the probate court, the effect of which would relate to what are deductions to be allowed under the national income taxing law, are conclusive and binding on the Federal courts when in considering a revenue act, and the duty of such courts is to exercise its own independent judgment."

In our opinion, therefore, the decision of the Board of Tax Appeals was erroneous; it is reversed and the cause is remanded for further proceedings not inconsistent herewith.

DISSENTING OPINION

GRONER, J., dissenting:

I am unable to agree, and I shall state the reasons of my dissent briefly.

The question at issue is controlled by the provisions of section 219 of the Revenue Act of 1921. Subdivision (d) of that section imposes a tax on the net income of each beneficiary of an estate or trust received in the taxable year "which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not * * *."

Fairly construed, I think it cannot be doubted that the true test of liability depends upon whether the income is distributable. If it is, it is taxable whether received or not. If it is not, it would seem to me to follow that it is nontaxable, even though received, as, for instance, by mistake. If I have correctly stated the rule, then it follows

that in this case the decision would turn on the question whether the income sought to be taxed was properly distributable to the taxpayer.

In Whitcomb v. Blair, referred to in the opinion of the court, there was agreement between both parties that the taxpayer was entitled to the sums received and taxed, and on that basis we held the taxpayer was "in fact and in law" entitled to receive the income which was taxed. After our decision, two of the remaindermen filed timely objections to the trustee's account. The Superior Court of California having jurisdiction of the trust, all parties in interest being then before the court, entered a decree charging the beneficiaries, including taxpayer, in the amount of $622,000 on the ground that that amount, representing depreciation for the years 1913 to 1927, had been unlawfully paid to them by the trustee, and also directing the trustee to withhold annually thereafter for depreciation a reasonable and proper amount from the income of the trust property. One of the beneficiaries paid in cash his share of the amount required to be returned to the trustee, but the others, including taxpayer, gave the trustee their notes bearing interest and payable at the termination of the trust. The acceptance of the notes was apparently with the consent of the remaindermen.

The case, therefore, is one in which a State court having jurisdiction of the estate and of the parties has decreed that the taxpayer was not entitled to certain portions of the income received by her over a period of years, including the year involved here, and that the sum so improperly received should be returned to the trustee, and the court's order has been obeyed. If, therefore, the statute taxes only the income properly received, and if the final decree of the State court is in accordance with the California law, as I think it is, and is therefore conclusive and binding, as it seems to me it is (Keith v. Johnson, 271 U. S. 1-8), it would follow necessarily that the final decree of that court forecloses the question.

In this aspect there remains only the question whether the decree of the State court was obtained in a collusive suit. There is nothing in the record to sustain a contention of that sort.

I think, therefore, the decision of the Board of Tax Appeals should be affirmed.

A true copy. Teste:

—— ——, Clerk Court of Appeals, D. C.

IN SUPREME COURT OF THE UNITED STATES

Nos. 129, 130, 131

ORDER EXTENDING THE TIME WITHIN WHICH TO APPLY FOR WRITS OF CERTIORARI—Filed March 16, 1933

On consideration of the motion of counsel for petitioner in the three above entitled cases, and good cause therefor having been shown, it is now here ordered that the time within which petition fof writs of certiorari may be filed herein be, and the same is hereby extended for a period of 60 days from April 9, 1933.

Dated this 16th day of March, 1933.

Geo. Sutherland, Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

IN SUPREME COURT OF THE UNITED STATES

Nos. 129, 130, 131

STIPULATION AS TO CONSOLIDATION, ETC.

It is hereby stipulated as follows:

(1) That while the above entitled proceedings were initiated before the United States Board of Tax Appeals by three separate appeals from a series of deficiency notices, the same were consolidated for hearing before the Board and only a single finding of fact and opinion were rendered upon which separate orders of redetermination were entered for the respective years involved.

(2) That on an appeal from the final decisions of the Board to the United States Circuit Court of Appeals for the Ninth Circuit, it was stipulated between the parties that because of the identity of the facts, parties and issues

for all of the years and in each of the different proceedings; that only one record be printed and briefs filed in cause No. 6835, and

(3) That the judgment of the United States Circuit Court of Appeals in cause No. 6835 be treated and considered as its judgment in causes Nos. 6833 and 6834.

Now, therefore, it is agreed between the parties that on application for writs of certiorari in the Supreme Court of the United States, the consolidated manner in which the cases were considered below may be continued; and in support of the consolidated petition for the issuance of writs of certiorari only the printed record below in cause No. 6835 may be filed, together with one supporting brief in consolidated form.

The judgment of the Court entered in cause No. 6835 below, under the docket number assigned to it in the Supreme Court, may be treated as the judgment of the Court in causes Nos. 6833 and 6834 below, under the docket numbers assigned to said causes in the Supreme Court under the consolidated proceedings entitled above.

The object of this stipulation is to simplify and save costs of printing records in each cause which would be only a duplication, if done.

Dated at Washington, D. C., this the 6th day of June, 1933.

W. W. Spalding, Attorney for Petitioners. J. Crawford Biggs, Solicitor General, Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 129

ORDER ALLOWING CERTIORARI—Filed October 9, 1933.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 129, No. 130, No. 131, No. 139, No. 140, No. 141, No. 142, No. 143, No. 144, No. 145, No. 146, No. 147, No. 148, No. 149, No. 150

STIPULATION AS TO RECORDS, ETC.—Filed Nov. 15, 1933

Subject to the approval of the Court, it is hereby stipulated between counsel in the above cases as follows:

1. Only cases numbered 129 and 145 are to be argued. These are to be argued as two separate cases.

2. The decision in No. 129 shall control the decision in Nos. 130 and 131 (Nos. 6833 and 6834 in the Circuit Court of Appeals for the Ninth Circuit) and Nos. 139-144, inclusive (Nos. 5664, 5667, 5669, 5671, 5672 and 5674 in the Court of Appeals of the District of Columbia). If judgment shall be rendered for the petitioner in No. 129, the judgments of the courts below shall be reversed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the respondent in No. 129, the judgments of the courts below shall be affirmed in each of the cases mentioned in this paragraph.

3. The decision in No. 145 shall control the decision in Nos. 146-150, inclusive (Nos. 5666, 5668, 5670, 5673 and 5675 in the Court of Appeals of the District of Columbia). If judgment shall be rendered for the petitioner in No. 145, the judgments of the Court of Appeals of the District of Columbia shall be reversed in each of the cases mentioned in this paragraph. If judgment shall be rendered for the respondent in No. 145, the judgments of the Court of Appeals of the District of Columbia shall be affirmed in each of the cases mentioned in this paragraph.

4. In preparing the record to be used in this Court in connection with the argument in No. 129, the Clerk shall include the following matters:

The record as filed with the petition for certiorari.

The opinion of the Court of Appeals of the District of Columbia in No. 139 (No. 5664 in the Court of Appeals of the District of Columbia).

The stipulation presented in connection with the petition for certiorari.

The order granting certiorari.
This stipulation.

5. In preparing the record to be used in this Court in connection with the argument in No. 145, the Clerk shall include only the following matters:

Docket entries, pp. 1-2.
Decision of the Board of Tax Appeals, pp. 24-25.
Petition for review filed in the Court of Appeals of the District of Columbia, pp. 25-27.
Orders enlarging time, pp. 65-66.
Opinions and judgments of the Court of Appeals of the District of Columbia in Nos. 139 and 145 (Nos. 5664 and 5665 in the Court of Appeals).
The order granting certiorari.
This stipulation.

The Clerk shall also include references only to the various proceedings which appear on pp. 2-24 and 28-64 in the record in No. 129.

6. This stipulation is entered into solely for the purpose of reducing the amount of printing required for the record in these cases. The parties stipulate that either shall have the right to refer in his briefs and oral arguments to any portions of the records in these causes as filed in this Court on petition for certiorari which are not contained in the record as printed pursuant to this stipulation.

Dated at Washington, D. C., this 14 day of November, 1933.

Claude R. Branch, Robert A. Littleton, Attorneys for the Petitioners. J. Crawford Riggs, Solicitor General.